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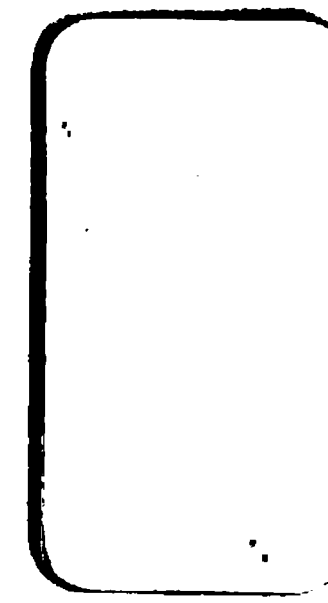

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JUDGES

OF THE

U. S. CIRCUIT AND DISTRICT COURTS,

FOR THE NINTH CIRCUIT.

HON. STEPHEN J. FIELD,
Justice of the Supreme Court allotted to the Circuit.

HON. LORENZO SAWYER,
Circuit Judge.

DISTRICT JUDGES.

HON. OGDEN HOFFMAN, . .	District of California.
HON. MATTHEW P. DEADY, .	District of Oregon.
HON. GEORGE M. SABIN, . .	District of Nevada.

MEMORANDA.

DEATH OF HON. EDGAR W. HILLYER.

After the calling of the calendar at the opening of the November Term, 1882, of the Circuit Court for the District of Nevada, Sawyer, Circuit Judge, and Sabin, District Judge, being present, Hon. B. C. Whitman, ex-Chief Justice of the Supreme Court of Nevada, addressed the court as follows:

"May it please the court: I take the first appropriate time, since the adoption by the bar of Nevada of resolutions upon the death of the Hon. Edgar W. Hillyer, late Judge of the United States District Court for the District of Nevada, at the request of the bar, to present their resolutions, and move that they be spread upon the minutes of the court. My preface will be short, for there is little necessity to say much of one whom we all knew and loved so well. More than I could say in cold words beats in the hearts of all who hear.

"Judge Hillyer was born in 1831, in the town of Granville, State of Ohio; he was educated at its academy, and came to the State of California in 1852. He was, after a due course of preparation, admitted to the bar in Placer County in that State, in 1857. In the year 1861, he became a member of the California Assembly, but, thinking he could serve his country better in the field than in the legislative hall he resigned, and enlisted as a private in one of the first companies formed in California upon the inception of the rebellion; he was shortly made Lieutenant, and served

with his company at Benicia Barracks and other places in California until, by reason of his special aptitude therefor, he was transferred to the staff of General McDowell, as Judge Advocate and Lieutenant Colonel; which rank he held when he resigned in 1865. To his military duties he brought all the ardor of his disposition, and it was against the desire of his commanding officer and all his associates of the regular army, that he left military life. But at the close of the war he felt that his duty lay in another sphere. So long as he deemed his services of use to his country, they were hers. All who lived in California at the time of which I speak, will recognize the fact that it was eminently true of the Union forces in that State, that 'they also serve who only stand and wait.' For the wild scheme of secession which was ripe, when its fruition was suddenly blasted by the quick and energetic action of General Sumner, and the wilder idea of a Pacific Republic, of which California was to be the head, might, to say the least, have caused loss of life and property, had not the prompt enlistment of volunteers, and the sagacious management of the small regular force in the State, presented such a solid obstacle to each and every rebellious vagary, that it was folly to attempt to put in practical operation, what had full growth in theory.

"Judge Hillyer came to the State of Nevada immediately upon his resignation from the army and entered upon the active and prosperous practice of the law, with W. S. Wood, Esq., a member of this bar. He was soon elected District Attorney of Storey County, filling that arduous office to the entire satisfaction of the whole community. While he felt the full obligation of his official duty, his well-balanced mind also recognized the fact, that a prosecutor should never be a persecutor.

"Upon the sudden and sad death of Judge Alex. Baldwin in 1869, Mr. Hillyer was appointed to fill the vacancy thus caused, and he served until his untimely decease. While our resolutions are mainly directed to his official career, it may not be amiss to say here that he brought to his high position, and to it constantly devoted, an equable disposition, a well-trained mind, force of character, great industry,

and utter lack of prejudice. He presided with dignity, heard with patient intelligence, and decided, upon thorough investigation, with absolute impartiality. His Honor, the presiding Judge, well knew and appreciated his worth; and we all at the bar respected and honored him as a Judge, and loved him as a friend. To those who knew him intimately and socially, his character was most lovely: he was a most genial companion, full of fun as a child, but always within the bounds of accomplished gentlemanhood.

"While living in Virginia City he made the acquaintance and shortly afterward married his present widow, then Miss Sarah Graham. Four children were the fruit of the marriage, of whom three, a son and two daughters, survive to mourn the loss of a kind father. Happily married, placed to his satisfaction in an honorable office, Judge Hillyer led a useful and satisfactory life. A great student, he, in addition to his official work (never, in the slightest degree neglected), thoroughly studied and learned the French and German languages. A son of the soil, descended from a line of sturdy farmers, he delighted to cultivate the little homestead which he had purchased in the suburbs of Carson City. This work, or play, as you please to call it, with music, in which he was a considerable proficient, diversified and lightened his sterner duties; and so he was living, when an accident, apparently slight at the time of its reception, after months of cruel suffering caused his death. He came of a long-lived and robust ancestry; his grandfather died within four months of one hundred years, in the full possession of his faculties; his mother was murdered by some unknown person, supposed to be a tramp, when alone in her house, at the age of eighty, in perfect vigor, and his father now lives, hale and hardy, at the age of eighty-three. Any one would have predicted, as we all would have wished, a long life to our deceased friend. By one of those inexplicable decrees of Providence, he, the respected, the loved, the useful, the good, was taken. I saw him shortly before he died, as he lay on his bed of suffering. I thought he recognized me as he pressed my hand, and looked in my face with a piteous smile, as if he asked why? I stood mute. I stand mute now. May we all live so that at the

quickly coming supreme moment our life sheaf may be as full of garnered loveliness, goodness, and usefulness, as that our dead brother brought.

"May it please the court, I offer the resolutions of the bar, and ask an order that they be spread upon the minutes of the court."

The Circuit Judge, on behalf of the court, responded as follows:

"The resolutions of the bar, and the observations of its distinguished representative, in presenting them to the court, express, in fitting terms, the high estimation in which our late associate on this bench was held; and the profound sense of the great loss, which, not only the bar and the bench, but the community at large, have sustained by his decease. In the sentiments expressed we fully sympathize and concur. No one can more keenly appreciate the extent of the loss than myself. For more than twelve years, we sat together on this bench, and jointly labored in the great work of administering justice; and in those labors, I never found our late brother wanting in any of the qualities that contribute to make a laborious, painstaking, conscientious, impartial, intelligent, and, in all respects, a worthy, useful, and efficient judge. Although firm in his convictions, when, after careful investigation, he had reached a satisfactory conclusion, his mind was singularly free from prejudice. He was ever ready to hear and fairly consider argument, and to, promptly, and, cheerfully, retrace his steps, if he found himself in error. His mind was analytical, logical, and acute; and in the council chamber, he, always, afforded valuable aid in the investigation and final correct solution of the many highly important and difficult questions presented to us for adjudication. His logical and appreciative mind rarely failed to lead him to correct results. Upon his utter impartiality and his unswerving integrity I always felt that I could rely with unquestioning confidence. In his domestic and social life, he was a model of urbanity and excellence—in all particulars an agreeable and instructive companion. His loss in all his accustomed walks, and all his relations in life, cannot fail to be deeply felt and deplored.

"The resolutions of the bar will be spread on the minutes of the court, and the court will now adjourn for the day out of respect for the memory of our deceased brother."

RESOLUTIONS.

Resolved, That the practitioners before the Circuit Court of the United States, for the Ninth Circuit, State of Nevada, do express in this public manner their deep sorrow at the death of the Honorable Edgar W. Hillyer, late Judge of the District Court of the United States for the District of Nevada; and thus testify their high esteem for his character and services, and their affection for his memory. Called to the bench in the very prime of life, he gave promise of a long and useful career thereon. To the universal grief of all who knew him this hope was blasted by the sad accident, which, ultimately, after months of suffering, caused his death at the comparatively early age of fifty years.

Resolved, That the qualities and powers displayed by Judge Hillyer in his judicial life, entitle him to an honorable rank among the magistrates by whom the courts of the United States have been adorned, and their jurisprudence wrought out and perfected. Called frequently to sit in this court, and in conjunction with its presiding judge, and alone to act in cases of great importance and varied interests, frequently involving new questions, or the adaptation of old principles and rules to new conditions, he invariably showed a clear and accurate knowledge of the fundamental reasons, which should govern in the several departments of the law. His mind was naturally strong, comprehensive, and impartial, and his unwearying industry, and untiring research, always kept him from the development of individual idiosyncrasy, and in the safe path of approved precedent. To try a case before him, was to know, that all the law which illustrated it, would be well considered and digested before decision. At the same time there was nothing narrow in his opinions, he was eminently catholic and broad; and with him justice and law went hand in hand. There were no dark corners in his heart. Urbane, but firm, as a judge, respecting his own dignity, he never trenched upon the rights of the bar. To its members his bearing was always cordial and familiar; but never so as to involve any loss of respect for himself, or the court; and such was their affection for him, that they mourn his death as the death of a near and dear friend. Those who knew him best, loved him most. There never was a more genial companion in private and social intercourse; he had all the buoyancy of a child, tempered by the refinement of an accomplished gentleman. A cordial companion, disinterested friend, dutiful son, kind and indulgent father, tender husband, wise and impartial judge, useful citizen, the sheaf of his life's labor is full of all that is lovely, pure, and noble.

PEACE AND FAREWELL.

Resolved, That the Court be requested to enter these resolutions upon its records, and that a copy be transmitted, by its clerk, to the family of our deceased judge and brother, as an assurance of our sympathy with them in their grievous affliction.

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DECISIONS

OF THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES, FOR THE NINTH CIRCUIT.

S. P. Sleppy *v.* Bank of Commerce, George L. Howard, and Charles H. Lee.

Circuit Court, District of Oregon.
February 22, 1882.

1. Damages for the Detention of Certificate of Deposit.—The defendants unlawfully detained a certificate of deposit of the value of two thousand dollars from the plaintiff: *Held*, that the plaintiff was entitled to recover damages for such detention equal to legal interest on the value of the certificate from the date of the demand therefor and refusal, to the recovery—and this without any evidence that the plaintiff would have converted said certificate into money and put it to use, other than his right to do so and the defendants' illegal prevention of the exercise of such right.

Before Deady, District Judge.

Edward Bingham, for the plaintiff.

M. W. Fechheimer, for the Bank of Commerce.

Deady, J. This action is brought to recover the possession of a certificate of deposit—No. 20,906—issued by the First National Bank of this city, on April 6, 1881, for the sum of two thousand dollars, made returnable to the plaintiff or order, and since endorsed "S. P. Sleppy, G. L. Howard, Chas. H. Lee," and "Pay First National Bank or order

for collection account of Bank of Commerce, St. Louis, J. C. Van Blarcom, Cashier," and alleged to be wrongfully detained from the plaintiff by the defendants.

The plaintiff is a citizen of Oregon, and the defendants are not. The action is brought under section 8 of the judiciary act of March 3, 1875 (18 Stat. 472), authorizing an action to be maintained in a circuit court of the United States to enforce a claim to personal property within the district where such action is brought, although the defendant therein shall not appear thereto, nor be an inhabitant of such district or found therein.

An order was made requiring the defendants to appear and answer within sixty days from the service on them of a copy thereof. This order was served upon the defendant, the Bank of Commerce, personally, at St. Louis, it being a corporation formed under the laws of that state and doing business therein, and on the National Bank aforesaid, in whose possession said certificate then was as the agent of the Bank of Commerce; and on the defendants Howard and Lee, who were not found anywhere, by publication.

The complaint has a double aspect, being in trover as well as replevin, and alleges that about May 20, 1881, the defendants "wrongfully converted said certificate to their own use," and still wrongfully "detain" the same from the plaintiff without his consent. But the action has been considered and tried as an action of replevin only, and the allegation as to the "conversion" of the certificate treated as surplusage.

It is also alleged that before the commencement of this action, and while said certificate was in the possession of said National Bank, as aforesaid, the plaintiff duly demanded of said bank as the agent of said defendants, the possession of said certificate, which was refused.

The answer of the Bank of Commerce admits that the certificate was issued to the plaintiff, as alleged, but denies knowledge or information as to whom it belongs now or since; and alleges that on May 31, 1881, persons claiming to be the Lee and Howard, whose names are indorsed on said certificate, deposited the same with it, for collection, and

that thereafter it forwarded the certificate to the National Bank aforesaid for collection; that about June 10th and 15th, said Lee made inquiry of said defendant whether or not said certificate had been collected, and was told that it had not, since which time the defendant had not been able to obtain any information concerning said Lee.

The cause was tried by the court without a jury. Upon the trial it appeared from the testimony of the plaintiff that soon after receiving the certificate of deposit he went to San Antonio, Texas, and after tarrying there a few days, started home by the southern route on a through ticket to San Francisco in an emigrant train; that shortly before reaching St. Louis, a person calling himself E. L. Stevens stepped into the car and asked him where he was going, to which the plaintiff answered, Portland, Oregon; whereupon Stevens said he was going there also and would be glad of his company—that he was going on to Wallawalla, and upon the plaintiff mentioning the names of two well-known citizens there with whom he was acquainted, Stevens said one of them was his uncle. After sitting awhile by the plaintiff, Stevens proposed to give him his address, for which purpose the plaintiff handed him an ordinary pocket memorandum book, which contained this certificate and a ten-dollar bill. After writing the address—"E. L. Stevens, Wallawalla, Washington Territory, met on train May 18, 1881"—he returned the book to the plaintiff, and after a short interval asked the plaintiff to write his name and address in his book, which he did. The train arrived at St. Louis about eight in the evening, and there Stevens said he had some business to attend to, which would prevent his going on until morning, and asked the plaintiff to wait for him at Kansas City. Before parting with the plaintiff, Stevens took him to a restaurant near by, to get his supper, and as he turned away put twenty-five cents into his hand to pay for it, saying he might be short of change. The plaintiff objected to taking it, but Stevens insisted, and as he went away said he could make it all right when they met on the cars at Kansas City.

The plaintiff waited at the latter place for Stevens until

the next evening, but he did not come, and then went on without him. At Los Angeles he made some purchases, and finding himself short of pocket money took out his memorandum book, intending to get the ten-dollar bill changed, when he ascertained that both it and the certificate of deposit were missing. As the train was then starting, he had not time to telegraph, but at the next station—Mojave—on June 7th, he telegraphed to the National Bank to stop payment of the certificate. The name of the plaintiff as indorsed on the certificate was admitted by him to be a good imitation of his signature.

It was also admitted by counsel for defendant that the plaintiff demanded possession of the certificate as alleged, and that the National Bank, acting under the instruction of the defendant "to neither deliver the certificate to the plaintiff nor pay him any money on it"—refused to surrender it and still retains the possession of the same.

The evidence is satisfactory that the *chevalier d'industrie*, calling himself "Stevens," of Wallawalla, abstracted the certificate from the plaintiff's memorandum book when he got possession of it on the train, under pretense of writing his address therein—the giving him twenty-five cents to pay for his supper was a precaution against the plaintiff's having to resort to the ten-dollar bill for that purpose and thus becoming aware of the theft before he left St. Louis. The subsequent indorsements upon the certificate of the names of the plaintiff, Howard and Lee, and the deposit of the same with the Bank of Commerce for collection, are probably the work of the same party or some confederates, who have wisely kept in the background since they learned that the owner was asserting his claim to the possession of the property.

It is practically admitted that the plaintiff is entitled to recover the possession of the certificate, but the claim of damages for its detention is earnestly resisted, upon the ground that the detention has worked no injury to the plaintiff, for the reason that the certificate is not money, and there could be no profit in the mere possession of it; that although the plaintiff might have converted it into

money and put the latter to profitable use, there is no evidence in the case that he would have done so. But so long as the National Bank is solvent, the certificate is the exact equivalent of two thousand dollars, and could be actually converted into that sum at the pleasure of the plaintiff. Practically it is money, and its detention has deprived the plaintiff of the use of that sum.

Nor is it necessary to prove that the plaintiff would have converted it into money and put it to use. It is sufficient that he had the *right* to do so—that he might have done so but for the unlawful detention of the certificate by the defendant.

When the use of property unjustly detained is valuable, the value of such use is generally adopted as the rule of damages. For instance, when work-cattle or horses are detained from the owner, who is thereby deprived of their use, the value of that use will ordinarily be the just compensation for their detention. (Wills on Replevin, sec. 579, and cases there cited.) But no proof is necessary to show that the owner would have used his horses or cattle during the time of their detention. His right to have done so is sufficient. And where the wrong consists merely in the detention of property, not the subject of daily use, without waste or depreciation, interest upon its value is often allowed as damages for the detention. (Id., sec. 537, and cases there cited.)

Merchants & Co. v. *Goodrich*, 75 Ill. 554, was an action to recover two certified checks of two thousand five hundred dollars each. The verdict was for the plaintiff, and in addition to the checks, gave him six thousand two hundred and seventy-five dollars damages for their detention, and one thousand two hundred and seventy-five dollars interest besides the value of the checks. Judgment was rendered on the verdict, but on appeal to the supreme court the judgment was reversed because it gave the plaintiff the checks and also their value and interest thereon as damages. But in the course of the opinion of the court it is said: "While there is no evidence upon the question of damages, the only damages which plaintiff could, in any event, recover for the wrongful detention of the checks, would be interest on five thousand

dollars at the rate of six per centum per annum from the time of the demand and refusal until they were replevied by the plaintiff." And this is equivalent to saying that such interest might be recovered as damages for the detention of certified checks which in legal effect and contemplation are the same as this certificate of deposit.

The pleadings and evidence are silent as to the date of the demand and refusal, except that it was prior to the commencement of the action, which was on June 27, 1881.

Interest will be allowed on the value of the certificate, as damages for its detention, at the rate of eight per centum per annum from that date—in even numbers for eight months.

The finding of the court will be that the certificate is the property of the plaintiff and of the value of two thousand dollars, and that he is entitled to the possession of the same and one hundred and six dollars and sixty-six and two thirds cents damages for its detention, and that he have judgment against the defendants for the delivery of said certificate, or the recovery of the value thereof, and the damages aforesaid and costs.

THE GLARAMARA—ROBERT MORTON, CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.
FEBRUARY 28, 1882.

1. TENDER OF PILOT SERVICE.—*Semble*, that a tender of pilot service by a river pilot to a vessel bound on a voyage to Portland, is not valid if made below Astoria and before the vessel has reached the pilot-ground of such pilot.
2. AMENDMENT OF STATUTE.—*Semble*, that section 1 of the act of December 20, 1865 (Ses. L., p. 33; Or. L., p. 707, sec. 12), giving half pilotage for a tender of pilot service to a vessel navigating the Columbia or Wallamet rivers above Astoria, was passed in contravention of section 22 of article IV of the constitution of the state, and is therefore void; but if considered valid, then section 1 of the act of October 25, 1870 (Ses. L., p. 51; Or. L., p. 710, sec. 27), declaring that such vessel, when "towed by a tug or steamer," should not be required "to take a pilot or pay half pilotage," is also valid, and therefore a pilot is not entitled to recover half pilotage for a tender and refusal of such pilot service.

Before DEADY, District Judge.

Rufus Mallory, for the libellant.

William H. Effinger, for the claimant.

DEADY, J. This suit is brought by the libellant, W. A. Betts, a river pilot, to recover the sum of thirty-four dollars, as half pilotage for a tender of services as such pilot to the bark *Glaramara*.

The libel alleges that on September 18, 1881, the *Glaramara*, a foreign ship of eight hundred tons burden, was in the Columbia river below Astoria bound on a voyage to Portland, when the libellant, a duly qualified and licensed pilot for the Columbia and Wallamet rivers, above Astoria, duly offered his services to the master of said vessel to pilot her to Portland, which offer was refused, although said vessel had no river pilot on board, nor had she then been spoken by any one; and that said vessel made the voyage to Portland, and arrived here about six days thereafter.

The master, Robert Morton, on behalf of the owners and claimants, George Nelson & Sons, White Haven, England, excepts to the libel, because it does not appear therefrom that the libellant is entitled to have any sum as pilotage from said bark. The exception does not state specifically, as it ought, wherein the libel is defective, but upon the argument it was contended: 1. That the tender of services being made below Astoria, off the libellant's pilot-ground, it was therefore insufficient and of no effect; and, 2. That it does not appear whether said voyage of said vessel to this port was made under sail or in tow.

By the law of Oregon (Ses. L. 1865, p. 33; Or. L. p. 707, sec. 12), it is provided that any river pilot, "who shall first speak any sea-going vessel ascending or descending the river above Astoria," shall be entitled to half pilotage therefor. The pilot-ground of the Columbia and Wallamet river pilots reaches "from Astoria to the head of navigation," but from Astoria to the open sea beyond the bar is the pilot-ground of the bar pilots. (Or. L., pp. 706, 707, secs. 6, 7, 11.)

Astoria is a port of entry, where foreign vessels bound to Portland usually stop, and change the bar tug for a river one.

The argument of the libellant is, that a competent and enterprising body of pilots is necessary to the security and convenience of commerce on these rivers, and to this end the law allows half pilotage to the pilot who first tenders his services to a vessel "ascending or descending" the same, and for the same reason will permit the tender of such services to be made before such vessel has reached Astoria and as soon as she is inside the bar of the Columbia. In support of this proposition and argument, counsel cites *Steamship Co.* v. *Joliffe*, 2 Wall. 456; *Wilson* v. *McNamee*, 102 U. S. 572; *Horton* v. *Smith*, 6 Ben. 264; *The Traveller*, Id. 280; *The Georgia* v. *D. Loud*, 8 Id. 392.

It is not denied that claims for pilotage are within the admiralty jurisdiction, and that a valid offer and refusal of pilotage service under the law giving half pay therefor establishes a claim for pilotage that may be enforced in this court. (*The Glenearne*, 7 Saw. 200, and cases there cited.) But the necessity of compulsory pilotage between Astoria and Portland, where sail vessels are usually towed by steamboats with licensed pilots on board, may well be questioned.

Neither do I think that the usual arguments in favor of half pilotage, as a means of encouraging and maintaining an active and competent body of pilots upon and about bars and other dangerous waters in the vicinity of or immediate approach to frequented harbors and ports, apply to the pilot grounds between Astoria and Portland. The duties of the river pilots, though requiring skill and local knowledge, are comparatively simple and free from danger. A vessel at Astoria does not require a pilot until she is ready to ascend the river, and in the mean time can remain at anchor or the dock in comparative safety.

From the nature of the case, then, I am of the impression, that a tender of pilot services by a river pilot to an ascending vessel below Astoria, on the bar pilotage ground, is invalid and of no effect.

The cases of *Horton* v. *Smith*, *The Traveller*, and *The Georgia* v. *D. Loud*, *supra*, cited in support of the sufficiency of the libellants' tender below Astoria, all relate to vessels bound through the passage in the East River called Hell Gate. By the law of New York, as construed by the court in these cases, the pilot ground of a Hell Gate pilot extends at least from a point seventeen miles eastward of Sands Point, on the Sound, to the city. For taking a vessel through the Gate channel certain fees are allowed, and for an offer and refusal of such pilot service, half such fees are allowed. An additional compensation is also allowed for taking a vessel over any portion of the rest of this pilot-ground, which appears to extend east as far as the Sound, before entering or leaving the channel, but nothing for a tender or refusal of services thereon.

The tenders in the cases cited appear to have been made within the pilotage ground of the pilots making them, and to vessels bound through the Hell Gate channel, though not then in it, and upon that ground they appear to have been upheld.

But in the case of the *S. & B. Small* (8 Ben. 523) the same court held that a tender of services by a Hell Gate pilot to a vessel then south-southeast of Block island, "bound to the sound" and through Hell Gate, was invalid. In support of this conclusion Judge Benedict says: "It seems reasonable to say that the master of a vessel cannot be required to determine whether he will or will not accept the services of a pilot when his vessel is so far distant from the channel as to which the pilot is supposed to be informed, and for which his services are needed, that the presence of a pilot on board, for the purpose of navigating those channels, would under all possible circumstances be absurd."

River pilots are not required to keep a pilot boat or cruise for vessels. There is no necessity for incurring such expense, and the compensation allowed them does not nor ought not to warrant it. But, if a river pilot is allowed to make a valid tender of his services below Astoria, on the

bar pilot ground, the result will be an unfair combination between certain of the river pilots and the bar pilots by which the former would be allowed practically to cruise on the bar tugs or pilot boats for vessels bound to Portland and tender their services as pilots above Astoria, and thus be enabled to monopolize the business.

But beyond all question this exception is well taken upon the second ground assigned on the argument. For by section 1 of the act of October 25, 1870 (Ses. L. 51; Or. L., p. 710, sec. 27), it is provided: "That no sea-going vessel whilst navigating the Columbia or Wallamet river shall be required to take a pilot or pay half pilotage if such vessel be towed by a tug or steamer."

It is not alleged in the libel that the *Glaramara* made the voyage in question to Portland under sail, or that she was not towed here by "a tug or steamer."

It would probably be better pleading to have raised this question by a peremptory exception, analogous to a plea in bar at common law, containing an allegation that the vessel made the voyage in tow of a steamer.

But it is tacitly admitted that she was so towed, and counsel have submitted the question upon this exception, in the nature of a demurrer to the libel, for the omission of the allegation that the bark made the voyage under sail, and it will be so considered.

Counsel for the libellant admits that under the act of 1870, *supra*, the bark was not required to take a pilot or pay half pilotage unless it appears that she was not towed up the river, but insists that said act is invalid because it is an attempt to amend the act of 1865, *supra*, which required her to take a pilot or pay such pilotage whether towed or not, contrary to section 22 of article IV of the constitution of the state, which enacts: "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended, shall be set forth and published at full length."

In my judgment this objection to the validity of the act is well taken. It is in substance and effect a material amendment of the act of 1865, made without the slightest

regard to the mandate of the constitution and in direct contravention of it.

But it appears that the supreme court of the state in *Grant Co.* v. *Sels*, 5 Or. 233, has decided that a repeal by implication, that is, without referring to the act repealed, is not within the purview of the constitutional prohibition, and is therefore valid. This court is bound by that decision. A similar question was before me in *Mayer* v. *Cahalin*, 5 Saw. 355, when I took occasion to give my views of the constitutional provision, but gave judgment according to the ruling in *Grant Co.* v. *Sels*.

But it may be that this act of 1870 is invalid even under the doctrine of the supreme court as announced in *Fleischner* v. *Chadwick*, 5 Or. 153; *Grant Co.* v. *Sels*, Id. 243; *Doland* v. *Bernard*, Id. 391. The act is entitled "An act further to amend the several acts relating to pilotage and towage on the Columbia bar and the Columbia and Wallamet rivers."

This is at least a reference to the act of 1865 by its "subject" if not by its title. The distinction taken in the cases cited seems to be that if an act professes to be amendatory of another it must be passed in conformity to the constitutional provision, but if not, although relating to the same subject, it is without its scope and operation. It is not then considered an amendment of any prior act, although it may change or repeal it by implication.

Admitting, however, that the act of 1870 is invalid, still this exception must be allowed. The act of 1865, under which the libellant claims half pilotage, was certainly passed in contravention of said section 22 of the constitution of the state.

By section 1 of the act of October 21, 1864 (Comp. Or. L. 1864, p. 841, sec. 22), the fees for pilotage between Astoria and the sea were specially prescribed; while "the fees of pilots on the river above Astoria" were to be "fixed" by the pilot commissioners. The act of 1865 professes to be amendatory of this act and correctly refers to its title. The act of 1864 was itself amendatory of the act of October 17, 1860. It contained only two sections, and the attempt to

amend it by the act of 1865 consisted in adding section 3 thereto, giving half pilotage to river pilots as above stated.

If the act of 1864 contained no provision on the subject of river pilotage in conflict with this added section, the amendment would be valid under any construction of the constitution. But the subject of pilotage above Astoria was already fully provided for in the first section of the act of 1864 to which this section 3 of the act of 1865 professes to be an amendment. The latter, so far as it goes, is in direct conflict with the former, in that, it takes the subject of half pilotage on the rivers out of the control of the commissioners, and prescribes an absolute rule on the subject. It purports to amend the prior act by adding a section thereto—by the addition of new matter and not a change of the old—but it is in fact an attempt to amend—change—section 1 of said act without specially repealing and re-enacting it as amended.

It follows that the libellant cannot recover in this case; because, either the act of 1865, giving the right to recover half pilotage, was void from its inception, as being passed contrary to the constitution, or the act of 1870 is valid and repealed by implication so much of the act of 1865 as allowed half pilotage for an offer and refusal of services.

The impropriety of taxing vessels navigating the river in tow, with the expense of pilotage, in addition to towage, is so apparent, that the act of 1865, which was the first one that ever undertook to make pilotage compulsory on the rivers, was soon repealed, or attempted to be.

When a vessel is being towed alongside, between Astoria and Portland, by a river steamboat with a licensed pilot on board, responsible for the navigation of both tug and tow, which, for the time being, are practically one, a more useless burden could not be imposed on commerce than to require the former to take a pilot, or pay half pilotage for the offer and refusal of one.

The exception is allowed, and the libel is dismissed.

BANK OF BRITISH COLUMBIA *v.* GEORGE MARSHALL & J. M. TEN BOSCH.

CIRCUIT COURT, DISTRICT OF OREGON.
MARCH 21, 1882.

1. PLEDGE.—Whether a transaction, by which personal property is given as security for a debt or an engagement, is a pledge or a mortgage, may be a question; but the law, in case of doubt, favors the conclusion that it was intended as a pledge.
2. PLEDGEE—RIGHTS AND DUTIES OF.—Although the pledgee is ordinarily entitled to the possession of the pledge, and therefore bound to use due diligence to preserve it from loss or injury, yet the rights and obligations of the parties to a pledge may be modified by special agreement, and then they are to be measured and ascertained by the particular intent of the parties, rather than any general rule applicable to a simple and unqualified pledge; and such intent may be gathered from the circumstances of the transaction, including the conduct of the parties to the pledge during its continuance, as well as their express agreements.
3. CASE IN JUDGMENT.—M. & Co. were wheat dealers in Portland and purchased wheat from the interior, and stored it in certain warehouses on the river front for sale to shippers, upon which the B. of B. C., from time to time, made advances under a written contract that it should be secured by the delivery of the warehouse receipts therefor, with a power of sale in case of default—such receipts containing a clause that in case of "flood" the property was at the risk of the "owner." The advances were repaid, from time to time, as M. & Co. disposed of the wheat with the consent of the B. of B. C., but while a portion of it was still in the warehouse it was injured by a rise in the Wallamet river, and while M. & Co. were assuming to care for it; the security for this reason proving insufficient to satisfy the claims of the B. of B. C., it brought this action to recover the balance due, and the defendants set up the loss by the injury to the wheat as a counter claim thereto. *Held*, that the transaction was essentially a pledge, and the wheat remained the property of M. & Co., but that notwithstanding this, it appears that it was the intention and understanding of the parties that M. & Co. should care for the wheat in case of flood, and therefore the plaintiff was not liable for the loss.
4. PARTICULAR QUESTIONS OF FACT.—It is in the discretion of the court to submit to or withhold from the jury a particular question of fact.
5. FINDING THEREON—EFFECT OF.—The court being of the impression that upon the written contract of bailment and the conduct of the parties under it as testified to by the defendant M. that the plaintiff was not bound to care for the pledge, instructed the jury to find a verdict for it for the balance due; and also instructed them to find whether the plaintiff was guilty of negligence in respect to the wharf, assuming that it was its duty to care for it as a pledgee in unqualified possession; the jury, in ad-

dition to the general verdict for the plaintiff, answered the particular question in the negative; the defendants moved for a new trial. *Held*, that the special finding was a fact in the case to which the court must give legal effect in any stage thereof, and that therefore the motion must be denied even if the court is now satisfied that its instruction to the jury as to which of the parties was bound to care for the wheat in case of flood, is erroneous, because it appears from such finding that the plaintiff, if even bound to care for the pledge, was not guilty of negligence, and therefore is not liable to the defendants for the loss sustained by the injury to it in any view of the matter; and also, that it is not an error, if error at all, of which the defendants can complain, that the court assumed in its charge to the jury that the uncontradicted testimony given in the case, by one of them, was true.

Before DEADY, District Judge.

William H. Effinger and Joseph N. Dolph, for the plaintiff.

H. Y. Thompson and George H. Williams, for the defendants.

DEADY, J. On September 27, 1880, the plaintiff was a foreign corporation doing a banking business at Portland, Or., and the defendants, George Marshall and J. M. ten Bosch, as George Marshall & Co., were engaged in the business of buying and selling wheat at the same place. They usually purchased wheat from the dealers and producers in the interior of the state, and shipped it in sack by boat and rail to Portland, where they stored it in the warehouses on the river-front, until disposed of for shipment abroad. When so disposed of, the vessels carrying the grain were usually loaded directly from the warehouse.

On that day, the defendants being desirous of procuring money from time to time, to be used in their business during the wheat season, and the plaintiff being also desirous of furnishing the same, the parties came to an understanding, in pursuance of which the defendants signed and delivered to the manager of the plaintiff, a printed letter addressed to and previously prepared by him, to the effect following:

"In consideration of advances made and to be made to us from time to time, we hereby agree to repay the same, with interest thereon, after the rate of ten per cent. per an-

num; and we further agree that all moneys and securities for moneys, warehouse, shipping, or other receipts, or other securities, which may from time to time be handed in to you by us, whether indorsed over or simply delivered, shall, during the whole time they are in your possession, stand to you as security for any balance that may then be due from us, to the said Bank of British Columbia, as for said advances or otherwise; we hereby giving to you, for said bank, a lien not alone upon the moneys or other securities now in your hands, but also upon all such to be hereafter and hereunder delivered to you.

"We hereby irrevocably authorize and empower you, for the said bank, to sell and dispose of all such personal property or any part thereof, at public or private sale, after the expiration of ten days' notice to us, and from the proceeds arising therefrom, to pay the principal and interest, and all charges that shall be then due, and the costs of sale, and the balance, if any, to pay over to us or our representatives, on demand."

Then follows a clause stating that "by the schedule hereto annexed we [the defendants] enumerate the securities referred to herein."

The proposition contained in the letter was accepted by the plaintiff. The schedule referred to is written below the letter upon the same sheet, and simply consists of a list of various lots of wheat and flour, the warehouse receipts for which were issued and delivered by the warehouseman to the manager of the plaintiff by direction of the defendants, and of certain promissory notes made or indorsed by them to the plaintiff. The first entry in these schedules is dated September 28, 1880, and reads: "5272 sks wheat, No. R [eceipt] 99; Greenwich" [dock]; and the second is dated October 1, 1880, and reads: "1630 sks wheat, No. R. 105; Pacific." The last one is dated February 2, 1881.

Between these dates the defendants caused to be issued and delivered to the plaintiff's manager, warehouse receipts from Portland warehousemen for 90,484 sacks of wheat, 13,096 half sacks of flour, and also the promissory note of the defendant Marshall for $1000 and that of —— Lent for

$275, from which the bank realized the sum of $192,745 30. During the same period the plaintiff advanced to the defendants sums of money which, with the interest charged thereon, amount to $204,943 48. And this action is brought to recover the difference between the amount realized from the securities and the account for money loaned—namely, $12,198 18.

The defendants by their answer allege that this wheat was "deposited" with and "pledged" to the plaintiff as security for the advances aforesaid, and it carelessly and negligently caused said wheat to be stored upon the lower tier of certain Portland wharves known as the Pacific, Jones', and Smith's wharf, at a place where the Wallamet river was accustomed to overflow; that about the middle of January, 1881, it did negligently permit 27,690 sacks of said wheat, of the value of $47,501 76, to be damaged by a rise in the water of said Wallamet river, whereby the value thereof was diminished by $20,046 75; and plead the same as a counter claim against the demand of the plaintiff, and pray judgment against the bank for the balance of $8,748 57.

The answer also contains allegations to the effect that certain of said securities were sold by the plaintiff without notice to the defendants, and that a portion of the wheat represented by said securities was sold for less than its fair market value, whereby the latter were damaged in the additional sum of $814 20. But on the trial these allegations were abandoned.

The plaintiff replied, and denies that the defendants ever deposited "with or pledged" to the plaintiff the property mentioned in the schedules aforesaid—denies that it stored the wheat on said wharves carelessly, or at all, or so neglected to care for it while there, or that the defendants suffered any damage by the negligence of the plaintiff concerning said wheat; and alleges that the warehouse receipts for said wheat were issued and delivered to the plaintiff's manager—W. W. Francis—in his own name, who thereupon indorsed them to the plaintiff, who thereby acquired under and by virtue of the stipulations contained in the letters aforesaid, "a lien as by mortgage or hypothecation upon

the wheat represented" by them; that the defendants selected the wharves upon which said wheat was stored and stored the same thereon, and had the same in their "actual possession" all the time it was so stored, and cared for it as they could or thought best, to prevent it from being injured by a rise in the river, and that the plaintiff was under no obligation to take any care thereof; that in January, 1881, the Wallamet river "suddenly and unexpectedly rose to a great and unusual height," by means of which said sacks of wheat were damaged as alleged without the negligence or fault of any one.

On the trial the defendant Marshall testified in substance that when he proposed to Mr. Francis to open an account with the plaintiff and give wheat receipts as security for advances, the latter said that he would take such receipts if issued to him directly by good warehousemen in Portland, but none other; and on being asked if receipts issued by Captain George Flanders, of the Greenwich dock, and Mr. Z. J. Hatch, of the Pacific docks—which phrase colloquially included the Jones and Smith wharves aforesaid—were good, he answered they were; that when, and as the defendants sold wheat for shipment, the receipts for which had been issued to Mr. Francis, they obtained an order from the plaintiff to the warehouseman for the removal of the same, and as soon as it was delivered to the buyer on the wharf or on shipboard they delivered the money or bills of lading received therefor to the plaintiff, and received from it the warehouse receipts which they surrendered to the warehouseman who issued them; that on the eleventh, twelfth, thirteenth, and fourteenth of January, the water rose in the Wallamet river until it was within seventeen inches of the lower tier or floor of the Pacific docks, and that in the afternoon of the latter day it was first ascertained from The Dalles that the Columbia river was rising, and that it was quite probable that the wheat was in danger, but it was too late to remove it with the means at hand; that Marshall watched the rise in the river day and night, and was of the opinion that the wheat was not in danger—at least to justify the expense of its removal—un-

til the unexpected rise in the Columbia was heard from, and that he then communicatod the news to Mr. Francis and conversed with him on the subject, who told him that he had no suggestions to make, whereupon Marshall commenced to remove the wheat as quickly as he could to the Greenwich dock, a distance of over a mile, but only succeeded in saving one thousand five hundred sacks before the wharf overflowed on the evening of the fourteenth of January, and prevented further operations.

It is a matter of common knowledge and general notoriety in this country, and was so assumed by counsel in their arguments, and by the court in its charge to the jury, that the Columbia river does not rise in the winter season, but is generally then at a lower stage than its southern tributary—the Wallamet—and that the sudden overflow of the latter on the Pacific docks on the evening of January 14th was largely due to the unprecedented rise in the Columbia, which by that time had reached the mouth of the Wallamet and backed up the water therein. It was also generally known and admitted that for some days before January 14th, telegraphic communication up the Columbia had been suspended by the falling of the wires from an extraordinary sleet storm, and that therefore the rise in the Columbia and the unprecedented warm rain to the eastward of the Cascade mountains, which produced it, were not known in Portland until the afternoon of January 14th, when a rise of some eight feet had already passed The Dalles—a distance of about one hundred miles east of the mouth of the Wallamet.

Receipts were issued to Mr. Francis by the direction of the warehouseman of the Pacific docks for the one thousand five hundred sacks of wheat removed to the Greenwich dock, and the wheat was afterwards sold by the plaintiff on due notice to the defendants, and the net proceeds applied on their account. The sacks of damaged wheat were afterwards removed from the Pacific docks, and the contents poured out and dried by Marshall with the consent of the plaintiff, and then sold by the latter, upon due notice, to the defendants, and the net proceeds applied in the same way. The receipts given by the Pacific docks to the plaint-

iff's manager were to this effect: "Received of W. W. Francis, manager, — sacks of wheat for account of W. W. Francis, manager," upon the conditions, among others, that storage is paid each month, that damage by flood is at "owner's risk," and that the receipt is returned before delivery made.

Mr. Francis died before the trial came off, and his testimony was not heard; and the defendant ten Bosch had removed to Liverpool without leaving his deposition, so that the testimony of Marshall was the only evidence, outside of the writings, as to the conversations or intercourse between the plaintiff and the defendants on the subject of the action; nor was there any evidence in the case tending to show that the defendants, prior to this action, ever claimed or asserted that it was the duty of the plaintiff to care for the wheat. On the argument of the case it was contended for the plaintiff that the issue and delivery of the warehouse receipts under the letter of the defendants constituted a mortgage of the property therein described to the plaintiff, by which the right of property in the grain was vested in it, while the possession, with the corresponding duty of caring for it in case of a flood or other danger, remained with the defendants.

On the contrary, the defendants insisted that the plaintiff thereby became the pledgee of the property with the control of the possession thereof, and was therefore bound to the use of reasonable care and diligence to prevent it from being injured; and that having neglected to do so, it was responsible for the injury thereto.

The court charged the jury, that, strictly speaking, the transaction was neither a mortgage nor a pledge, but in its essentials partook more of the character of the latter than the former. That taking the writing given by defendants to the plaintiffs, and construing it by the light of the surrounding circumstances and the conduct of the parties under it, as shown by the warehouse receipts and the uncontradicted testimony of the defendant Marshall, it appears that it was the intention of the parties that the property in the wheat should remain in the defendant, and that the

possession thereof was given to the warehouseman as the bailee and agent of the plaintiff, and subject to its control for the purposes for which the receipts were issued to it; but that the grain while in the possession of the warehouseman, as aforesaid, was held by him at the risk of the owner, in case of flood, who must therefore bear the loss occasioned thereby, and accordingly directed the jury to find a verdict for the plaintiff for the amount claimed by it.

And the court also said to the jury that the parties in the pleadings, evidence, and argument, having made the question whether the plaintiff was guilty of negligence or not, and it being desirable that any question of fact in the case that might be material to its correct determination upon either construction of the contract or transaction contended for, should be settled by the jury so as to avoid the delay and expense of a new trial in case the construction now adopted should not be approved by the appellate court, it would and did submit to them the question—whether the plaintiff, assuming it to have been a pledgee of the property and bound to use ordinary care and diligence to prevent it from being injured by the flood, was upon the evidence guilty of negligence in the premises.

The jury found a verdict for the plaintiff as directed, and answered the question submitted, in the negative; and the defendants now move for a new trial, for error of law occurring at the trial and duly excepted to, and because the verdict is against the law and evidence.

The error excepted to, is so much of the charge as "was given in relation to the legal effect of the contract and the possession of the wheat."

On the argument of the motion no question was made by counsel for the defendants as to the sufficiency of the evidence to support the verdict and the finding; but the latter was treated as something immaterial. It was insisted, however, that the court not only erred in construing the contract, but also in assuming that the testimony of the defendant Marshall, as to the conduct of the parties under it, was true, instead of leaving it to the jury. No such objection to the charge was made at the time, and therefore is not now en-

titled to be heard. If it had been made before the jury retired, the court, if it was thought material, could have easily obviated it, by saying to the jury—"if you believe the testimony of the defendant Marshall as to the conduct of the parties to this transaction, in relation to the deposit, care, and custody of this wheat while upon the Pacific docks, your verdict must be for the plaintiff." The result must have been the same. It was assumed in the argument by counsel for both parties that his statements in this respect were correct, and certainly the defendants ought not to complain if the court did likewise.

Nor do I think the court, in construing this written contract for the jury—ascertaining what the parties intended by it—erred, as against the defendants, in reading it by the light of the unquestioned conduct of the parties under it, as they then mutually understood it, as shown by the uncontradicted testimony of one of them.

If there is any error in the charge, it must be in the conclusion to which the court came concerning the legal effect of the contract and the acts of the parties thereunder, to which the defendants duly excepted.

Whether a transaction amounts technically to a mortgage or a pledge is sometimes a nice question; but the ultimate object of the inquiry is not so much to name the transaction as to ascertain what was the intention and understanding of the parties to it, and therefore such intent, when ascertained, ought to control.

In the case of a pure pledge the creditor takes the possession, actual or constructive, of the goods, while in that of a mortgage there is a transfer of the title to him, but not the possession. (2 Kent, 577, n. 1; Story on Bail., secs. 286, 287, 297.) In all cases then where personal property is given as a security for a debt or engagement, accompanied by a change of possession, either actual or constructive, the transaction better comports with the character of a pledge than a mortgage; and where the transaction imports nothing more than giving a security, without a sale or change of title of the property, the law favors the conclusion that it

was intended as a pledge and not a mortgage. (Schouler's Bail. 163.)

But the rights and obligations of the parties to a pledge may be modified indefinitely by special contract between them—as that the pledge shall be kept, until the default of the pledgor, at some particular place, or by some particular person. (Id. 205; *St. Losky* v. *Davidson*, 6 Cal. 647.)

My impression still is, that the transaction between the plaintiff and the defendants is in its essential features a pledge. There was no sale of the property or transfer of the title to the plaintiff, but a deposit thereof with the warehouseman of the Pacific docks, as a security for money loaned to the defendants. The term "mortgage" is not used in the contract, neither does it contain any language which indicates in the least, a sale, or transfer of title. The stipulation for a lien, though unnecessary in case of a pledge, is in harmony with the idea of one, of which it is an essential feature; but inconsistent with the idea of a mortgage which goes further, and passes the legal title. The power of sale is also consistent with the purpose to constitute a pledge, of which it is a legal incident, although not an unusual provision in a mortgage.

The issue and delivery of the receipt was only a mode of furnishing the plaintiff with the evidence of the deposit of the pledge at the place agreed upon, and the right to the possession of the same and to dispose of it according to the terms of the bailment.

But from the nature of things, it was a pledge qualified by the situation and subject of the contract and the conduct of the parties under it, so that the custody of the property, instead of being actually or absolutely in the plaintiff, remained in the warehouseman, subject to his control for the purposes of the contract, and while there, at the risk of the "owners"—the defendants—in case of flood.

The contract of the warehouseman with the plaintiff, as appears by his receipt, provided that the wheat, while there, should be at the risk of the "owners," as to "flood," and

this receipt was issued and delivered to the plaintiff with this stipulation, at the instance and by the direction of the defendants.

The defendants then claimed and still claim that they were the owners of this wheat, and there is no doubt in my mind that they were. This being so, and nothing appearing to the contrary, they must have been understood. upon delivering the receipts to the plaintiff, as taking the risk of floods while the wheat was owned by them and stored in that warehouse, even if there was no other fact in the case tending to prove that such was the understanding.

But admitting that the court erred in its charge to the jury in this respect, and that it should have charged the jury as contended by the defendants, that the plaintiff was an unqualified pledgee of the wheat and as such bound to use ordinary care and diligence to prevent it from being injured by the flood, still the motion for a new trial ought not to prevail, because it appears from the special finding of the jury that even upon that theory of its liability the plaintiff was not guilty of negligence in the premises.

To avoid this conclusion, counsel for the defendants assume that this finding is an immaterial matter, and therefore one that can have no weight in the consideration of this motion. Upon what ground this assumption rests does not appear; no authorities are cited or reasons given in support of it.

There is no doubt that the court had authority to submit this question to the jury for its determination. Section 212 of the Oregon civil code provides that the court "in all cases may instruct them [the jury], if they render a general verdict, to find upon particular questions of fact." And this special finding shall control any general one with which it is inconsistent. (Id., sec. 213.)

The submission of particular questions of fact to the jury is a matter wholly within the discretion of the court. (*Am. Co.* v. *Bradford*, 27 Cal. 365; *Taylor* v. *Ketchum*, 5 Rob. 514; S. C., 35 How. 296.)

This finding is therefore legally a part of the case, and must have such effect as it is entitled to in any subsequent

proceeding therein. The question was one upon which the parties gave evidence and submitted argument to the jury. Upon the defendants' theory of the transaction—that it was simply a pledge, and therefore the plaintiff was bound to use ordinary care and diligence to save the grain from injury—the question was a material one, because they could not maintain their counter claim for the injury to the wheat, even if the plaintiff was held to be the pledgee thereof, unless they also proved that such injury was the result of its negligence.

Suppose the question had not been submitted, and that the court should now be satisfied that the charge to the jury was erroneous, and that they should have been instructed that it was the duty of the plaintiff to care for the wheat, and suppose the court should also be of the opinion that according to the weight of the evidence given on the trial, the plaintiff was not guilty of negligence, the motion for a new trial would be denied. For the counter claim of the defendants cannot be maintained upon any view of the law as to whose duty it was to take care of the wheat, unless the plaintiff was guilty of negligence. A new trial is never granted for an error occurring in the progress of the case when it is apparent to the court that upon a retrial the verdict must be the same. (Thomp. Charg. Jury, 162.)

But this is, if anything, a stronger case against the motion. For the jury, upon the question being submitted to them upon the whole evidence in the case, have found that there was no negligence. Nor is there any complaint that this question of negligence was not fairly and fully submitted to the jury, or that the parties were not fully heard upon it or in any manner surprised by it. As has been said, the question was directly made by the parties in their pleadings, evidence, and arguments, and in my judgment it was really the only question in the case for the jury.

The motion must be denied and the plaintiff have judgment upon the verdict.

1882.] Points decided.

H. B. STUBBLEFIELD *v.* JAMES MENZIES.

CIRCUIT COURT, DISTRICT OF OREGON.
MARCH 27, 1882.

1. DONEE UNDER SECTION 8 OF THE DONATION ACT.—J. R. took an undivided one fifth of the land occupied by her deceased father, under section 8 of the donation act (9 Stat. 497), and married H. in March, 1859: *Held*, that she took such interest directly from the U. S. as her general property, but that after February 14, 1859, under the operation of section 5 of Article XV of the constitution of the state, it became her separate property, and not subject to the marital rights of her husband.
2. LIMITATION—LIFE ESTATE AND REMAINDER.—When the husband has a life estate in the lands of the wife and she the remainder, the statute of limitations runs against him in respect to such life estate, but not against the wife in respect to the remainder, during the continuance of such life estate; and when such life estate is lost by an adverse possession sufficient to bar an action by the husband for the recovery thereof, a conveyance of the premises by the husband and wife only passes the wife's interest, the remainder, and therefore does not enable their grantee to maintain an action for the possession during the life of the husband.
3. STATUTE OF LIMITATIONS—REPEAL BY IMPLICATION.—By the law of Oregon since May 1, 1854, an action to recover possession of real property was barred by an adverse possession of twenty years, and in case of a married woman the limitation did not include the period of coverture; and during the same time a married woman might bring an action to recover her separate property without joining her husband therein: on October 17, 1878, an act was passed (Ses. L., p. 21), reducing this period to ten years, and providing that the same shall not be extended more than five years by reason of the disability of marriage; and at the same session of the assembly, an act was passed (Ses. L., p. 92), on October 21st, concerning the rights and liabilities of married women, and the relation between husband and wife, "which provided (section 7) that a wife might prosecute and defend all actions at law or in equity, for the preservation and protection of her rights and property, as if unmarried:" *Held*, that the passage of the second act did not affect the first one, and that notwithstanding it, a married woman was entitled to five years in addition to the time allowed an unmarried one, within which to bring an action for the recovery of the possession of her real property.

Before DEADY, District Judge.

George H. Durham, for the plaintiff.

Julius Moreland and Cyrus Dolph, for the defendant.

DEADY, J. The plaintiff, a citizen of the state of Illinois, brings this action against the defendant, a citizen of Oregon, to recover the possession of an undivided one fifth of the donation of Calvin Reed, situate in township 1 north, range 3 east of the Wallamet meridian, which he alleges in his complaint the defendant unlawfully withholds from him, to his damage, one thousand dollars.

The defendant, answering the complaint, denies that the plaintiff is the owner of any interest in the premises or entitled to the possession thereof; and further pleads as a defense to the action the statute of limitations, that is: that neither the plaintiff nor his predecessor in interest has been seised or possessed of the premises within twenty years; but that the defendant and those under whom he claims have been in the open, notorious, and exclusive possession thereof, claiming the same in fee simple, under color of title, for more than twenty years.

The plaintiff, replying to the answer, denies the allegations thereof and alleges that on October 23, 1854, Calvin Reed became a settler on the premises under the act of congress of September 27, 1850 (9 Stat. 497), commonly called the "Donation act," and on November 16, 1855, duly filed his notification thereon, together with the preliminary proofs required by law, and that he continued to reside thereon under said act until his death, in February, 1856—leaving five children surviving him; that thereafter due proof was made of Reed's compliance with the act up to the time of his death, so that a patent certificate was duly issued to his heirs at law therefor on April 30, 1863, in pursuance of which a patent was issued by the United States to said heirs on March 26, 1866; that one of said five children—Juliet Reed—was born in 1840, and married to one Harne in March, 1859, while still a minor, and is still his wife; and, that in 1880 and before the commencement of this action, the plaintiff, by a conveyance duly executed by said Juliet and her husband, "succeeded" to the interest of said Juliet in the premises.

To this reply, the defendant demurred generally, and upon the argument insisted that the facts stated did not

take the case out of the statute of limitations, as amended by the act of October 17, 1878 (Sess. L., p. 21), which provides that sections 4 and 17 of the Oregon civil code be amended so that an action for the recovery of the possession of real property shall be brought within ten years after the cause of action accrues or within one year from the approval of that act; and that if the person entitled to bring such an action be at the time the cause thereof accrues "within the age of twenty-one years," or "married women" [a married woman], the time of such disability shall not be a part of the limitation; but such limitation "shall not be extended more than five years by any such disability," nor in any case longer than one year after such disability ceases. Prior to this amendment, the period of limitation for such actions was twenty years, and the time the person entitled to bring the action was under the disability of infancy or coverture was altogether excluded from the limitation.

The children of Reed took this donation under section 8 of the donation act upon the death of the settler, their father, and the proof of his compliance with said act up to the time of his decease, directly from the United States, as its donees, and not as the heirs of the deceased settler. (*Hall* v. *Russell*, 3 Saw. 509; S. C., 11 Otto, 512.)

The plaintiff claims under the donee of the United States, and appears to have a good paper title to an undivided one fifth of the donation. The claim of the defendant, so far as appears, rests upon an adverse possession of twenty years prior to the commencement of this action—September 7, 1881. This cause of action did not accrue then until this adverse possession commenced—September 7, 1861. At that time Juliet Reed, the plaintiff's grantor, was a married woman. She may also have been an infant, for according to the replication she was born in the year 1840. But as an uncertain or ambiguous allegation is taken most strongly against the pleader, the court must conclude that her birth was prior to September 7th in that year, because, consistent with the allegation, it might have been. Therefore it will be assumed that she was not laboring under the disability of infancy when this cause of action accrued, because she

may have been then twenty-one years of age. The act of October 11, 1864 (Or. Laws, p. 564), fixing the majority of females at eighteen years of age or lawful marriage, was passed after she became of age, and has no application to the subject.

As the law then was, Juliet had twenty years in which to bring her action after she was relieved from the disability of marriage. So the case stood when seventeen years thereafter, before the expiration of the twenty years and while she was still a married woman, the act of October 17, 1878, *supra*, was passed, which in effect gave her one year after its approval to bring her action, if a single woman, and if married, five years in addition thereto—making in all six years from October 17, 1878. Upon this statement of the case it is plain that the action is not barred. But the defendant contends that the interest which Juliet took in this donation was her "separate property," and therefore as to it she was not disabled to sue, because she might by the law of this state since May 1, 1854 (see Or. L. 1853–4, p. 65; Or. Civ. Code, sec. 30), have brought an action to recover the possession thereof without joining her husband therein.

There is no reason known to the law for saying that Juliet took her interest in this donation as her separate property. It came to her, generally and without qualification, as a donation from the United States, with not a word in the law making the grant, or a circumstance in the nature of the case, to restrain or limit it to her sole and separate use to the exclusion of the marital right of her husband, according to the then law of the state. As the case stood prior to the transition from the territorial to the state government, February 14, 1859, whenever the woman became married, the law cast upon her husband an estate in her property for the period of their joint lives. He became seised of a freehold therein, *jure uxoris*, and was entitled to the rents and profits accordingly. (2 Kent, 130; Bishop on M. W., sec. 529; *Starr* v. *Hamilton*, 1 Deady, 272; *Wythe* v. *Smith*, 4 Saw. 10; *Elliott* v. *Teal*, 5 Id. 249.) And this was a vested right, and no more subject to legislative control than if it

had been purchased by the husband with his money from a stranger. He could only be deprived of it by due process of law. (*Starr* v. *Hamilton*, 1 Deady, 275; *Wythe* v. *Smith*, 4 Saw. 23.)

But the marriage of Juliet with Harne did not take place until after February, 1859, when, as defendant contends, the law in regard to the right of the husband in the wife's property was changed by art. XV, sec. 5 of the constitution of the state, which provides: "The property and pecuniary rights of every married woman at the time of marriage or afterwards acquired by gift, devise, or inheritance shall not be subject to the debts or contracts of the husband; and laws shall be passed for the registration of the wife's separate property."

The language of this provision is somewhat vague and indefinite. It does not, in so many words, undertake to make any property of a married woman her separate property that was not so before or which would not be so independently of it. It only professes to exempt her property from the debts and contracts of her husband. Her separate property, if she had any, was already so exempt, and there was nothing for it to take effect upon, except her general property, which was then subject to the marital rights of her husband.

But in *Starr* v. *Hamilton*, *supra*, 274, this court held that "so far, at least, as third persons are concerned," this clause ought to be construed as equivalent to a declaration that the property enumerated therein shall be the separate property of the wife, because "if the wife's property is not 'subject to the debts or contracts of the husband,' he is thereby precluded from any control over it, and if he has any benefit or interest in it, it is beyond the reach of his creditors." The same conclusion seems to have been reached by the supreme court of the state, in *Rugh* v. *Ottenheimer*, 6 Or. 231.

Upon this point the plaintiff contends that the constitution does not prevent the husband from taking a freehold in his wife's property, as at common law, but only deprives him, in the interest of the family, of the power to dispose of it or charge it by his debts; and that he is nevertheless

entitled to the possession for their joint lives, and if deprived of it may maintain an action therefor.

Upon this theory of the case, the statute of limitations has never commenced to run against the wife, who since her marriage, and before the disseisin, has only held an estate in remainder in the property, and was not therefore entitled to the possession. The statute of limitations does not affect the right of a party entitled to the estate in remainder, during the continuance of the particular estate or freehold; nor does the laches of the tenant for life affect the remainder-man. (*Jackson* v. *Schoonmaker*, 4 Johns. 401; *Jackson* v. *Sellick*, 8 Id. 269; *Moore* v. *Jackson*, 4 Wend. 64.) But the right of the husband of Juliet as tenant of the particular estate, is barred by the twenty years' adverse possession of the defendant. The husband has never been under any disability, and was bound to bring his action for the possession within twenty years from the commencement of the adverse possession of the defendant, or after the passage of the act of October 17, 1878, within one year from the approval of that act, which he failed to do.

The legal deduction from these premises is, that this action cannot be maintained, because the wife, as tenant of the remainder, is not entitled to the possession during her husband's life, and neither is the husband, as tenant of the freehold or life estate, so entitled, because his right is barred by the statute of limitations.

But counsel for the plaintiff seeks to avoid this conclusion from his premises, by the suggestion that the conveyance of the husband and wife to the plaintiff united both estates in him—the particular or less estate being, in the language of the books, merged or sunk in the greater, and that therefore he can maintain this action as the grantee of the whole estate. A merger of estates only takes place where the greater and less estate meet in one and the same person. (2 Black. 177; *Oregon Trust Company* v. *Shaw*, 5 Saw. 388.) But in this case, the husband being disseised of his estate and barred of his remedy to recover it before the conveyance to the plaintiff was made, had then nothing in the premises to convey. The estate for his life which it is

claimed that he acquired in the property on his marriage with Juliet was already out of him and practically in the defendant. And this is so, whether we consider the statute as operating to pass the title to the life estate from the husband to the defendant, or as merely rebutting the right of the latter to claim the same. In either case, the plaintiff has lost what the defendant has gained. (Ang. on Lim., secs. 1–11; *Leffingwell* v. *Warren*, 2 Black, 605; 420 *Mining Co.* v. *Bullion Mining Co.*, 3 Saw. 657.) But upon the authority of *Starr* v. *Hamilton*, *supra*, and *Rugh* v. *Ottenheimer*, *supra*, the husband never acquired any estate in this property. The marriage having occurred after the constitution went into effect, the property is to be regarded as the separate property of the wife, in which he acquired no interest, and the case must therefore finally turn upon the question whether the wife had one year or six after the approval of the act of October 17, 1878, *supra*, in which to sue, or in other words, whether the five years additional given by section 17 of the code as amended by that act, applies to all actions brought by married women for the recovery of the possession of real property? The statute makes no distinction. It says, in effect, that a married woman shall have not to exceed five years within which to bring an action to recover the possession of real property in addition to the time allowed by section 4 of the code, to persons not laboring under such disability.

But counsel for defendant contends, that as by section 7 of the act of October 21, 1878 (Ses. L., p. 93), it is provided, among other things, that a wife may prosecute and defend all actions at law or in equity for the preservation and protection of her rights and property, as if unmarried, therefore she not only *may* prosecute an action for the recovery of real property within the time allowed an unmarried one, but she *must* do so.

This conclusion is based on the assumption that section 17 of the code as amended by the act of October 17th, *supra*, is, so far as it gives married women five years additional time in such cases, repealed by said section 7 of the act of October 21, *supra*. In support of the position counsel cite:

Bull v. *Bulard*, 52 Barb. 141; *Enos* v. *Buckley*, 94 Ill. 458; *Gray* v. *Yates*, 67 Mo. 601; *Slater* v. *Cave*, 3 Ohio St. 87. In the first case the acts of 1860–2 having provided that a married woman might maintain an action for an injury to her person, as if single, and recover judgment therein to her sole and separate use, the court held that the prior statute extending the time of bringing such an action, in case the party injured was a married woman, was in effect thereby repealed, and that such action was barred by the lapse of six years as in ordinary cases.

The philosophy of this ruling, if not the ruling itself, is, I think, unsound. So far as a married woman was exempt from the operation of the statute of limitations it was because of her status as a married woman, which was supposed to disqualify or disable her from asserting her rights, and not for the reason that she therefore might not be permitted to sue alone.

The disability was imputed to her because during marriage she was regarded by the common law as being *sub potestate viri*, under the power of the husband (2 Kent, 129), and therefore not free to sue without his assent, even if she had the legal right to do so. In *Wythe* v. *Smith*, 4 Saw. 27, this court said: "The exemption proceeds upon the theory that while she [the wife] is under the disability of coverture, she is not in fact at liberty to sue without her husband's assent, even if the law will permit it." Indeed the husband may be interested against her, and to prevent her being injured by the operation of the statute while under this restraint, it was provided by the act of 21 James I, of which the American statutes are substantial copies, that the limitation should not run against a woman while she was married. In the second case it was held that the statute of 1861, which gave a married woman the same control over her property as a single one, repealed the disability clause as to married women in the limitation act of 1859. The third case is nowise in point, and the fourth one only decides that the phrase "within twenty-one years" in the limitation act of 1831 was the equivalent of "within the age of majority," and therefore the act of 1834, fixing the

age of majority for females at eighteen years, so far modified or repealed it.

But there is a material difference in these cases and the one under consideration. In all, the question is one merely of legislative intent. In the cases cited it was held that the prior statute was modified by the subsequent one. But the fact of the considerable lapse of time between the two statutes was a circumstance that favored that conclusion. Here, there is no such reason for inferring an intent to change the law. On the contrary, the fact that the acts were passed at the same session and within four days of each other, bears strongly in the other direction. There is no direct conflict between the two acts. Repeals by implication, if permitted at all by the constitution of the state, are not favored. When there are two acts on the same subject, the rule is to give effect to both if possible. There must be a plain repugnancy to produce a repeal by implication. When both acts may stand, they shall. (Smith's Com., sec. 757; *United States* v. *Tyner*, 11 Wall. 92.)

As already stated, a married woman could always sue alone in this state, when, as in this case, the action affected her separate property—that is, she could sue as a *feme sole*, and she can do no more under the act of 1878, *supra*. Yet the statute of limitations has always given her additional time on account of her status, within which to bring an action to recover real property. Indeed, until the act of 1878, *supra*, the time during which she was in the state of marriage was not counted as a part of the limitation, and she was entitled to the full period of twenty years, after the removal of such disability. It is evident from this, that up to 1878, it was not the intention of the legislature to compel a married woman to bring her action within the same time as an unmarried one, because it permitted her to do so. By the act of 1878 a radical change was made in the law. The general period of limitation was reduced from twenty to ten years; and the time allowed for the disability of marriage was reduced to five years at the furthest.

But still a married woman, although she could sue as an unmarried one to recover her real property, was specially

excepted from the operation of the statute during marriage, so that the limitation was not thereby extended more than five years.

The act is evidently a compromise between the old and the new idea, and may be only a stepping-stone to the complete abolition of the distinction in this respect between the married and unmarried state. But for the time being it is the law. It represents the legislative intention of the assembly of 1878; and it is not the province of the court to anticipate the future.

Did the legislature by the passage of an act at the same session, entitled "An act defining the rights and fixing the liabilities of married women and the relation between husband and wife," intend to repeal the act just passed by it? It seems to me there can be but one answer to this question. The subjects of the acts are cognate but not identical, and there is no repugnancy or conflict between them, and they must both be considered in force, unless the contrary intent plainly appears. The general provision contained in section 7 of the latter act—that the wife *may* prosecute and defend *any* action concerning her rights or property as an unmarried woman, in her own name—in no way conflicts with the positive provision in the former, giving her not to exceed five years more than an unmarried woman within which to bring an action for the recovery of her real property. These acts were passed contemporaneously. The scope of neither is trenched upon by the other. There is no ground, therefore, upon which the court can say that the latter was in any way intended to modify the former.

Therefore the plaintiff, who stands in the shoes of Juliet Harne, his grantor, has until October 17, 1884, or six years from the approval of the act of that date, within which to bring this action.

The demurrer is overruled.

1882.] Points decided.

RUDOLPH DANNMEYER *v.* J. V. COLEMAN ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
APRIL 3, 1882.

1. STOCKHOLDER'S SUIT AGAINST CORPORATION.—A bill in equity by a stockholder against a corporation and its officers for relief, which the corporation itself should have sought, must not only state the grievances which entitle the stockholder to sue, but that he has exhausted all means within his reach to obtain redress within the corporation.
2. SAME.—The stockholder must make an earnest, not a simulated effort, with the managing body of the corporation to induce remedial action on its part, before he will be heard in his own behalf.
3. SAME.—If he fails with the directors of the corporation, and time permits, he must show in his bill that he has made an honest effort to obtain action by the stockholders as a body.
4. PERSONAL EFFORTS.—He must himself have made an effort to secure a redress of grievances through the corporation. The efforts of some other stockholder several years before will not suffice.
5. STOCKHOLDER AT TIME OF TRANSACTION.—He must have been a stockholder at the time of the transactions of which he complains, or his shares must have since devolved on him by operation of law.
6. THE STATUTE OF LIMITATIONS of California applies to both legal and equitable causes of action; and an action for relief on the ground of fraud is barred in three years, the cause of action not to be deemed to have accrued till the discovery by the aggrieved party of the facts constituting the fraud.
7. DEMURRER.—Where it appears that the fraudulent acts constituting the cause of action were performed more than three years before the filing of the bill, a demurrer will be sustained, unless it also appears that the facts constituting the fraud were not discovered till within three years.
8. KNOWLEDGE OF FRAUD.—The means of knowledge of fraud are equivalent to actual knowledge.
9. JURISDICTION.—Where alienage is the jurisdictional fact, all the parties on one side of the controversy must be aliens, and all on the other side citizens.
10. JURISDICTION IN STOCKHOLDER'S SUIT.—Whether, where an alien stockholder of a California corporation sues California corporations, and citizens of California in the United States courts, on behalf of himself and all other stockholders, it is not necessary to allege that he and all stockholders on whose behalf he sues are aliens, *quære?*
11. SAME.—Whether, where an alien stockholder of a California corporation seeks an accounting in equity, between such California corporation and several other corporations and citizens of California, the United States courts have jurisdiction, *quære?*
12. SEVERAL STOCKHOLDERS' SUITS.—Whether each owner of a share of stock can bring a suit on his own behalf, and on behalf of all other stockholders for the same grievances, *quære?*

Before SAWYER, Circuit Judge.

THE complainant, a citizen of Germany, and the owner of one hundred of the five hundred and forty thousand shares of the capital stock of the Consolidated Virginia Mining Company, a mining corporation, organized under the laws of the State of California, filed his bill in equity, on his own behalf, and on behalf of all other stockholders of the Consolidated Virginia Mining Company, against James V. Coleman and James C. Flood, executors of W. S. O'Brien, deceased; The Nevada Bank, John W. Mackay, James G. Fair, James C. Flood, The Pacific Mill and Mining Company, The Pacific Wood, Lumber, and Flume Company, The Pacific Refinery and Bullion Exchange, and the Consolidated Virginia Mining Company. The object of the bill is to obtain an accounting between the defendant, the Consolidated Virginia Mining Company, and the several other corporations, defendants, the defendants Coleman and Flood, as executors of O'Brien, and Mackay, Fair, and Flood, in their individual characters as partners in the transactions set out, for large sums of money and a large amount of property, alleged to be ten millions of dollars in the aggregate, charged to have been fraudulently obtained upon various large transactions from the Consolidated Virginia Mining Company, by the other corporations, defendants, which are alleged to have been organized and controlled in pursuance of a conspiracy for that purpose, by the personal defendants, who also, as is alleged, owned a controlling interest in the Consolidated Virginia Mining Company, and were either the officers, or elected and controlled the officers, of that corporation. The sums so fraudulently and unlawfully obtained by said several corporations from the Consolidated Virginia Mining Company, are charged to have been distributed in dividends to said Flood, O'Brien, Mackay, and Fair, or otherwise to have come into their hands.

The prayer of the bill is as follows: "Wherefore, your orator prays that it be by your honor adjudged and decreed, that the defendants, said Flood, Mackay, and Fair, and

Flood and Coleman, as executors as aforesaid of the estate of said O'Brien, account to the said Consolidated Virginia Mining Company and to the stockholders thereof for all the wrongs, frauds, and breaches of trust hereinbefore alleged and complained of; and on such accounting repay and restore to the said Consolidated Virginia Mining Company for the use of the stockholders therein, except the defendants in this action, all profits, moneys, and property belonging in law and equity to said company, realized, gained, or obtained by said defendants, or any of them, by means of the dealings and transactions hereinbefore set forth, together with all the proceeds and fruits thereof," and for such other and further relief as may be just.

The allegations of the bill as to the acts of defendants, are similar to those contained in the bill in *Burke* v. *Flood et al.*, 6 Saw. 221, and it would serve no useful purpose to state them more fully now. Mackay has not been served, and has not appeared. The Consolidated Virginia Mining Company demurs separately to the bill on various grounds, and several of the other defendants also, demur upon similar grounds.

H. G. Sieberst, for complainant.

George R. Wells, for certain defendants.

S. Heydenfeldt, for Consolidated Virginia Mining Co.

SAWYER, Circuit Judge, after stating the facts. In the recent cases of *Hawes* v. *The Contra Costa Water Company*, 104 U. S. 450, and *Huntington* v. *Palmer*, Id. 482, which went up from this court and were affirmed, the United States supreme court states the conditions which are necessary to enable a stockholder of a corporation to bring a suit on his own behalf, and on behalf of the other stockholders, to vindicate the rights of the corporation. After stating the character of the grievances necessary to entitle the stockholder, instead of the corporation, to sue, the court says: "But in addition to the existence of grievances which call for this kind of relief, it is equally important, that before the shareholder is permitted in his own name to institute and conduct a litigation

which usually belongs to the corporation, he should show to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation to induce remedial action on its part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains."

There is no allegation whatever in this bill, that the complainant has made any effort to induce the corporation, the Consolidated Virginia Mining Company, to seek a redress for the grievances alleged. It does not appear that he ever requested the directors to sue, much less that he ever made "an earnest, not simulated effort with the managing body of the corporation to induce remedial action on its part;" nor does it appear, that "he has made an honest effort," or any effort of any kind, "to obtain action by the stockholders as a body," or even any stockholders individually; and nearly four years is, certainly, time enough to permit him to make such "an honest effort."

He alleges that one S. P. Dewey, a stockholder in said corporation nearly four years before, at a regular session of the board of directors, made an application and demand that the corporation bring a suit against the said Flood, O'Brien, Mackay, and Fair for the recovery of the same moneys on the same grounds as alleged in this bill, but that the said directors refused to bring the suit. But the action of Mr. Dewey cannot avail the complainant in this bill. He does not appear to be in privity with Dewey, or to have been in any way connected with the request. Reasons not applicable to the complainant in this bill, may have existed, that would justify a refusal to act upon Dewey's request. At all events, if the complainant desires action, he must himself take steps to secure it before he can acquire a *status* that will enable him to take the vindi-

ion of the rights of the corporation and other stockhold-

ers, into his own hands. There is nothing in the opinion of the supreme court to indicate that the action of a stranger to him, for that stranger's own purposes, will give complainant the requisite *status*. It does not appear who were the directors or stockholders of the Consolidated Virginia Mining Company at the time of the filing of this bill, or for three and a half years prior to that date. Had the complainant applied to the board of directors then conducting the affairs of the corporations, it may be that his request would have been effectual. At all events, we are not authorized to assume the contrary without averment, and it should at least appear that some recent honest effort has been made to secure the protection of the rights of stockholders through the action of the corporation itself. But even Dewey does not appear to have made any honest, or any effort at all, to obtain action by the stockholders as a body. So his action was in this respect, also, insufficient within the decision, to enable him to maintain such a suit, much less the complainant.

The supreme court further says: "The efforts to induce such action as complainant desires on the part of the directors and of the shareholders, when that is necessary, and the cause of failure in these efforts should be stated with particularity; and an allegation that complainant *was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law;* and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it would otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

There is no allegation showing any of these facts. There is no allegation "that complainant was a shareholder *at the time of the transactions of which he complains*, or that his shares have devolved on him since by operation of law." All the acts complained of occurred before the decease of O'Brien, which is alleged to have happened May 2, 1878, three years and six months before the filing of the bill. It does not appear that complainant was the owner of the stock, *or of any stock*, at or prior to that date; or when, or how, or for

what purpose, he became owner of the stock now alleged to be held by him. For aught that appears in the bill, he may have purchased the stock on the day or week in which the bill was filed, with the sole design of bringing a suit for speculative or malicious purposes. It is an open, notorious, historical fact, appearing in the daily stock reports, familiar to all Californians, that at the date of the filing of this bill, and for a long time prior thereto, the stock of this corporation had but a very trifling value—less than three dollars per share.

One with ideas of existing frauds, expanded to ten millions of dollars, or having a private grudge to satisfy, might very well think it a good operation to invest a few dollars in the purchase of one hundred out of five hundred and forty thousand shares of stock, to serve as the basis of a speculative or malicious suit. But the supreme court, in effect, says, in the passages quoted, that a suit on such a basis cannot be entertained; that the complainant must affirmatively allege that he "was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since," *not by purchase*, but "*by operation of law.*" He must also show that the suit is not a collusive one; and that he has in good faith made an honest effort to induce the corporation itself to redress its own grievances, and on failure with the corporation, has made an effort to induce the stockholders as a body to act.

Not satisfied with simply deciding these principles as questions of equity law, the supreme court carried them into a rule of court, which now reads as follows:

Equity rule 94. "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his shares have devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set

forth with particularity, the efforts *of the plaintiff* to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

Thus, the bill must disclose the efforts of "the plaintiff," *not of others*, to secure redress in the ordinary mode. (See also *Huntington* v. *Palmer*, affirming the case cited, 104 U. S. 483.)

In view of past judicial history, both here and elsewhere, the supreme court, in my judgment, acted wisely in laying down the principles stated in its recent decisions, and its rule with reference to this class of bills filed by stockholders. It is always a suspicious circumstance, where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation, and all other stockholders; and especially is this so, where the amount of stock owned by him is so very limited, that in case of success, his own share of the recovery will be so small as to make the maxim, *de minimis non curat lex*, very properly applicable; which would be the case in this instance but for the enormous, not to say astounding, amounts alleged upon information and belief only, to have been fraudulently appropriated. The bill does not contain the allegations referred to or required by these decisions and this rule; and it is, therefore, insufficient on those grounds.

The suit is, also, barred by lapse of time in analogy to the statute of limitation. In this state, the statute of limitation applies to all causes of action, equitable as well as legal. The ground upon which the suit is rested is fraud. The moneys and property of which an account is sought and restoration asked, are alleged to have been obtained through the fraudulent conspiracy and acts of the natural persons, who are defendants. And under section 338 of the code of civil procedure, subdivision 4, "An action for relief on the ground of fraud," must be brought within "three years," the cause of action not to be deemed to have accrued "until the discovery by the aggrieved party of the facts constituting the fraud." But when it appears

that the acts were performed more than three years before the commencement of the suit, a demurrer to the bill will be sustained, unless it is also averred that the facts constituting the fraud were not discovered till within three years. (*Sublette* v. *Tinney*, 9 Cal. 425; *Boyd* v. *Blankman*, 29 Id. 44; *Carpentier* v. *Oakland*, 30 Id. 444; *Broderick's Will*, 21 Wall. 518.) All the acts alleged as constituting the cause of suit, were acts in their nature hostile and adverse at the moment of their performance, and all of them occurred before the death of O'Brien, which is alleged to have happened on May 2, 1878, three years and six months before the filing of the bill. There is no averment of their discovery within three years. On the contrary, they are shown by the allegations of the bill to have been well known, and that Dewey made a written demand upon the board of directors, that they bring an action in the name of the corporation, against the other defendants upon the same grounds as alleged in this bill, and to accomplish the same purpose. Besides, the principal facts constituting the fraud appear in the bill to be matters of public and corporate record under the statutes, of such general and public notoriety, that stockholders and even strangers must have known them. If they did not, especially stockholders, who were entitled to examine the corporate records, they must have been negligent, and careless of their own interests. The means of knowledge were open to them, and means of knowledge are equivalent to actual knowledge. (*Manning* v. *San Jacinto Tin Co.*, 7 Saw. 418; *Broderick's Will*, 21 Wall. 518–19; *Ashhurst's Appeal*, 60 Pa. St. 317; *Wood* v. *Carpenter*, 101 U. S. 141; *New Albany* v. *Burke*, 11 Wall. 107.)

An averment, therefore, of discovery within three years, even if it had been made, it would seem, would have been futile in view of the other facts disclosed in the bill.

It is unnecessary to decide other points discussed by counsel, as more than enough to sustain the demurrers have already been determined. (See *Burke* v. *Flood*, 6 Saw. 220, for a discussion of some of them.) The bill, however, suggests some jurisdictional and other points which have

not been made or discussed by counsel in this case, nor so far as I am aware, in the precise form in any other. They must sooner or later occur to counsel, and be presented for adjudication, and they may as well be now suggested for consideration.

The first point made in complainant's brief is in these words: "The injuries complained of and the remedies asked being common to all the stockholders, one of them may sue, but MUST *join the others.*" A whole page of authorities is cited to sustain the point. It is, doubtless, intended to say, join them in the sense of suing on his own behalf, and on behalf of all other stockholders.

If he is right in this proposition, then the suit is not the suit alone of the stockholder who sues, but the suit of all the stockholders on whose behalf he sues. And under the decision of the supreme court in the removal cases, in order to give the national courts jurisdiction, is it not necessary to aver, not only that the stockholder named as complainant on the record, but all of the stockholders on whose behalf he sues, are aliens? Under the decisions in those cases, *all* the parties on one side must be aliens, and all on the other side citizens.

Again, the primary controversy in this case is between the Consolidated Virginia Mining Company, a California corporation, on one side, and all the other defendants on the other side. The relief sought is an accounting between the Consolidated Virginia Mining Company with, and a decree in its favor against, all the other defendants. The whole main and primary controversy is between those parties.

The complainant, Dannmeyer's interest, as a stockholder, is only secondary and derivative, and merely incidental to that of the corporation. Transferring the corporation from the side of the defendant to that of the complainant, who is simply using the corporation and litigating in his own name, and actually in behalf of the corporation and for its own benefit, as is suggested in the removal cases, should be done for the purpose of determining the question of jurisdiction, and we have an alien and a California corpora-

tion on one side, and several California corporations and citizens on the other. Does not this oust the jurisdiction?

Again, for aught that appears in the bill, all the personal defendants may be citizens of the same country with the complainant, and the bill fails to show a case of jurisdiction on that ground, as it does not appear that the controversy is between aliens on one side, and citizens of the United States on the other. This particular defect might, of course, be remedied by amendment.

Another question is suggested by this case. By reference to *Burke* v. *Flood*, *supra*, it will be seen that a similar suit for these same grivances was brought by a single stockholder, Burke, on behalf of himself and *all other stockholders*. And it is a notorious, historical fact, of which the daily newspapers have been full, that these are not the only suits brought in the same way for these same grievances. Is each holder *of one* of the five hundred and forty thousand shares of stock entitled to bring a suit in equity on behalf of himself and all other stockholders for an account of these same transactions; or when such a suit has been brought by one stockholder, must the others come in and seek their relief in that suit? If each stockholder is entitled to bring such a suit, then there is something wrong in the law, and the sooner the supreme court by rule, or congress by statute, regulates the matter, the better it will be for the due administration of justice.

For the reasons given the demurrer must be sustained, and the bill dismissed, and it is so ordered.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* JOHN J. DOYLE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
APRIL 3, 1882.

1. MORTGAGE.—The conveyance of lands by the Southern Pacific Railroad Company, to D. O. Mills and Lloyd Tevis, in trust, to secure the payment of certain "first mortgage bonds," in the usual form of a mortgage, except being to trustees, with a condition of defeasance, providing, that upon the payment of the bonds, "this indenture and the estate hereby

granted shall cease and determine," etc., with a clause reserving to the grantor the "sole and exclusive management and control" of the lands, and only providing for an entry, foreclosure, and sale by the trustees, upon default and subsequent demand by the bondholders, is in substance and law a mortgage under the California code; and the right of possession until default, and a demand by the bondholders, remains in the mortgagor, or grantor.

2. MORTGAGE DEFINED.—Under the code, a mortgage is a "contract by which specific property is hypothecated for the performance of an act without the necessity for a change of possession." The mortgage may confer a power of sale upon the mortgagee, "or any other person," after breach of the obligation secured.
3. MORTGAGE—TRUST.—Where the mortgage confers a power of sale upon any person, other than the party secured, it necessarily, also, embraces a trust; but it does not necessarily give a right of possession of the mortgaged property to the trustee, before condition broken.
4. TRUST DEED UNDER CODE.—If the instrument in question, under the code, is strictly a trust deed, rather than a mortgage, the result is the same in this case; for it conveys no right to the possession, management, or control of the lands upon the trustees, till after default, and a demand by the bondholders.
5. EXPRESS TRUSTS may be created under the California code to sell real property and apply or dispose of the proceeds, but it must be "in accordance with the instrument creating the trust," and, in this instance, the lands conveyed by the terms of the deed are left in the sole and exclusive management, control, and possession of the grantor till default and demand.
6. TITLE, WHERE VESTED.—Under the code, every valid express trust vests the title in the trustees, subject to the execution of the trust, and not in the beneficiaries.
7. SAME.—Whatever the estate is, be it great or small, created by the trust deed, the whole is vested in the trustees; but *what* the estate is, which vests in the trustees, its extent, and quality, depends wholly upon the terms of the instrument creating the trust, and not upon the code.
8. ESTATE NOT EMBRACED IN THE TRUST.—Under the code, "where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust.
9. TRUST ESTATE.—The sole, exclusive management, control, and possession of the land in question, being by the express terms of the trust deed, or mortgage in question, left in the grantor till default and demand by the bondholders, this portion of the estate was not embraced in the trust, and, in the language of the code, "is left in the author of the trust"—the Southern Pacific Railroad Company.
10. RIGHT OF ACTION.—The right of possession, management, and control of the lands, embraced in the mortgage, or trust deed, whichever it may be, being by the terms of the instrument left in the grantor, the right of action to recover possession against trespassers, is in the Southern Pacific Railroad Company—the grantor and author of the trust.

Before SAWYER, Circuit Judge.

IN this case, the defendant, in addition to the points heretofore made in the case of the *Southern Pacific Railroad Company* v. *Orton* (6 Saw. 157), and the several cases tried with it; and the case of the same plaintiff against Pryor, now claims, that before the institution of this action, the plaintiff conveyed all the lands derived under the congressional grant to D. O. Mills and Lloyd Tevis; and that, at the date of the commencement of this action, the legal title, right of possession, and consequently the right of action, were in said Mills and Tevis, and not in said plaintiff; and, for that reason, said plaintiff cannot recover. To establish this defense, the defendant introduced in evidence an indenture, made by the plaintiff to said D. O. Mills and Lloyd Tevis, bearing date April 1, 1875, duly acknowledged, and recorded in the several counties through which the road is located, and in which the lands are situated. The recitals and provisions of said deed material to this question, are as follows: "Whereas the party of the first part * * * is about to issue its first mortgage bonds upon said railroad and telegraph line, and rolling stock, fixtures and franchises, and also upon the land granted to it by congress * * * and whereas, the board of directors * * * at a meeting of said board, at which all the members were present, did by a resolution to that effect, which was unanimously adopted and passed, determine and direct, that first mortgage bonds upon said railroad and telegraph line, its rolling stock, fixtures, and franchises, and upon said hereinbefore described lands * * be prepared, executed, and issued by the president and secretary of said company; * * * and whereas the said board of directors at the meeting aforesaid, and in the manner and form and by the vote aforesaid, did further resolve, that the said series A of said bonds should be executed, and issued in substantially the following form, which form is headed 'First Mortgage Bonds.' And in the bond it is said, 'This bond is one of series "A" of the first mortgage bonds issued, and to be issued by the said South-

ern Pacific Railroad Company.' * * * All of said bonds are secured by a mortgage or deed of trust, bearing even date with the bonds * * * duly executed by said company to D. O. Mills and Lloyd Tevis * * * as trustees, upon its railroad and telegraph lines * * * aggregating eleven hundred and fifty miles of railroad and telegraph lines, with all the rolling stock, stations, fixtures, and franchises for the permanent use thereof. * * * Also all the lands granted to said company by the congress of the United States * * * not sold or otherwise disposed of prior to the execution of said mortgage," etc. The said instrument further recites, that, whereas congress granted to said company certain alternate sections of land, and, "whereas the said board of directors, at the meeting aforesaid, and in the manner and form and by the vote aforesaid, did further direct, that to secure the payment of said bonds, a first mortgage upon said rolling stock, stations, fixtures, right of way, franchises, and the lands aforesaid granted by said acts of congress, not sold or otherwise disposed of or contracted to be sold, as shown by the books of said company, should be executed under the corporate seal of said company, and be signed by the president and secretary, to D. O. Mills and Lloyd Tevis * * * as trustees for the holders of said bonds. * * * Now, therefore, this indenture witnesseth, That the said Southern Pacific Railroad Company, for the better securing of the payment of the principal and interest of the said first mortgage bonds, and in consideration, also, of the sum of one dollar, to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, convey, and confirm unto the said parties of the second part, and to their successors duly appointed, for the execution of the trusts herein set forth, the following property now or hereafter constituted, purchased, acquired, held in possession and owned by said company, to wit: The whole of the railroad and telegraph line of the said company, running from the city of San Francisco, in the state of California, in a

southerly and south-easterly direction, by way of Carnadero junction, Salinas valley, and Polonio pass, to the Colorado river, at or near the 'Needles;' also, from Carnadero junction to San Benito; aggregating eleven hundred and fifty miles of railroad and telegraph lines, including all the rights of way, roadway, track, and tracks, together with all the superstructures, depots, depot-grounds, station-houses, watering-places, work-shops, machine-shops, machinery, side-tracks, turn-outs, turn-tables, weighing-scales, locomotives, tenders, cars, rolling stock of all kinds, full equipments, fixtures, tools, and all other property which may be necessarily or ordinarily used in operating or repairing the said railroad, including all of the said property, which is now or may hereafter, in whole or in part, be constructed, or completed, purchased, acquired, held, or owned by the said company, pertaining to said railroad, and all the corporate rights, privileges, and franchises of said company, pertaining to said road, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging and appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues, and profits thereof, with all the rights, titles, interests, estate, property, succession, claim, and demand, in law or equity of the said party of the first part, of, in, and to the same, or any part and parcel thereof; to have and to hold the above granted and described premises, property, and franchises, with all the appurtenances, unto the said parties of the second part, and to the survivor of them, and to their successors, duly appointed, upon trust and for the use and benefit of the person or persons, body or bodies, politic or corporate, who shall have become, or be from time to time holders of the said 'first mortgage bonds' or any of them. Provided, always, and these presents are upon the express condition, that if the said party of the first part, or its successors, shall well and truly pay, or cause or procure to be paid unto the holders, from time to time, of said bonds, and each and every one of them, the said sums of money secured to be paid by the said bonds, and the interest coupons attached thereto, at the places and times, and in

the manner set forth in the said bonds, according to the true intent and meaning thereof, then these presents, and all the property, estate, right, franchises, and privileges herein and hereby granted and conveyed, shall cease, determine, and be void."

"But if default shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest coupons or either of them, or any part thereof, and if the same shall remain unpaid for the period of six months from and after the time when the same should have been paid, according to the terms of said bonds, then the said parties of the second part, or either of them, upon the refusal of the other, or their successors in said trust, by themselves, or their agents or servants, in that behalf, may upon request of the holder or holders of not less than one fourth of said bonds, on which the interest or principal shall so be and have so remained in default, as aforesaid, enter into and upon and take possession of all, or in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroad, and receive the income, receipts, and profits thereof and out of the same" pay certain specific charges and indebtedness in the order named, * * * "or the said parties of the second part may in such case foreclose this mortgage and sell and dispose of, according to law, all the rights, property, privileges, franchises, real and personal, with the appurtenances herein and hereby granted, or so much thereof as may be necessary, and out of the money arising from such sale pay the costs, charges, and expenses," etc. * * * "And the said party of the first part hereby covenants and agrees that if, at any time, any lands now used for depot or shop purposes, or right of way or water, or any lands not now used, but which may be hereafter used for such purposes, shall for any cause cease to be needed or used by said party of the first part for such purposes, the said parties of the second part may sell the same at the price to be agreed upon by the parties of the first and second parts, and apply the money realized from such sale or sales to the redemption of said bonds in the manner

hereinafter provided in the case of money realized from the sale of lands granted by the United States to the said party of the first part." * * *

"This indenture further witnesseth: That the said party of the first part, for the purpose of securing the payment of the sums of money mentioned in said bonds and the interest thereon, and in consideration of the premises, and also for and in consideration of the sum of one dollar to the said party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, enfeoffed, conveyed, and confirmed, and by these presents does grant, bargain, sell, release, enfeoff, convey, and confirm unto the said parties of the second part, as trustees, and to their successors and survivors, and their assigns forever," all the lands granted by the act of congress as described in the instrument. "To have and to hold all and singular the lands hereby granted or intended to be granted, and each and every part and parcel thereof, with the appurtenances thereunto belonging, unto the said parties of the second part, and their successors and survivors and their assigns forever, as trustees, for the uses and purposes, and upon the trusts, terms, conditions, and agreements in this indenture set forth and declared."

"Provided always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with the interest thereon at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then, and from thenceforth, this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part."

"This indenture further witnesseth, that these presents, and the said bonds are made, executed, and delivered, upon

the trusts, terms, conditions, and agreements following, that is to say: That all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second parts, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees as hereinafter provided. But no title to any tract of land, contracted to be sold by the said party of the first part, shall be given until the whole of the purchase money of said tract shall be paid to said parties of the second part, or their successors or survivors, in cash or in said bonds or overdue coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands as they shall from time to time become subject to sale, to be carefully examined, and surveyed, and shall fix to each tract or parcel such price as in their judgment shall be most judicious, having in view the interests of all parties; and said lands shall be and remain, at all times thereafter, open for sale to any person who may desire to purchase and pay therefor, the prices being, nevertheless, at all times, subject to revision and alteration by the said parties, and the party of the first part may reserve from sale any lands necessary for depot grounds, or other purposes connected with the construction or operation of said railroad or telegraph. The purchaser of any such land shall be at liberty to pay for the same in the aforesaid bonds or overdue coupons at par; and when any tract or parcel of said lands shall have been purchased and paid for, either in bonds, coupons, or cash, as hereinbefore provided, the same shall be conveyed by the said parties of the first and second parts to the purchaser, in fee simple, and shall, by such conveyance, be absolutely and forever released from any and all liens or incumbrances for or on account of said bonds, or any other debt or obligation of the said party of the first part." * * * "The

said trustees shall apply the proceeds of the sales made by them of lands hereby conveyed, to the sole and exclusive purpose of the payment of the bonds provided for in, and issued in conformity to the terms of this indenture. And for such purpose all such avails shall, from time to time, as the same are realized, be used in the purchase of such bonds in the market, to be cancelled, so long as purchases thereof can be made at par, and whenever such bonds cannot be purchased at that rate, said trustees shall advertise for proposals to sell such bonds to them, in two newspapers published in the city of New York, and one newspaper published in the city of San Francisco; and after receiving such proposals they shall have power to purchase such bonds at the lowest terms so offered." * * *

"If any default shall be made in the payment either of principal or interest on any of said bonds for six months, after demand at the place of payment, when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed, and foreclose this mortgage, and may sell at public auction so much of said lands as may be necessary to discharge all arrears of such interest, and apply the proceeds, after deducting the costs, charges, and expenses of such entry, foreclosure, and sale, to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal, the principal sum of all bonds then outstanding shall become due and payable, and the said trustees may enter into and take possession of all the lands above by these presents mortgaged or conveyed, foreclose this mortgage and sell at public auction all such lands, or so much thereof as may be necessary, first giving at least six months previous notice of the time and place of sale in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Los Angeles, and San Diego; and they shall apply the proceeds thereof, after deducting the costs, charges, and expenses of such last mentioned entry, foreclosure, and sale, to the pay-

ment of all said bonds, then outstanding, and the interest accrued thereon, rendering the surplus, if any there shall be, unto said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute, and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part, in and to the property so sold, to the same extent as the same shall have been previously enjoyed and held by the said party of the first part."

"If after any such entry shall be made, or any such foreclosure proceedings shall be commenced, for the satisfying of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, and deliver the coupons therefor to the said trustees, and pay all the costs, charges, and expenses incurred in such entry and foreclosure and the proceedings thereon; then and in every such case the said trustees shall discontinue their proceedings thereon, and restore to the said party of the first part all of such lands, to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms, and conditions of these presents, in like manner as if such entry had not been made, nor such foreclosure proceedings commenced." * * *

"Whenever all the bonds which shall have been made and issued by the said party of the first part under and in conformity to the provisions of this indentnre, with the interest thereon, together with all the expenses incurred by the said trustees in the execution of the trust herein and hereby created, shall have been fully paid or satisfied, the said trustees shall reconvey to the said party of the first part, all and singular the said lands then in the hands of the said trustees and not before that time sold or disposed of in the execution of the trust hereby created."

Lake & McKoon, for plaintiff.

H. E. Higkton and H. E. McBride, for defendant.

SAWYER, Circuit Judge, after stating the facts. It is claimed by the plaintiff, that the instrument in question is only a mortgage with a power of sale, the legal title and right of possession remaining in the mortgagor; while the defendant asserts that, under the provisions of the code, and the decisions of the courts of California, it is a trust deed, which vests the legal title and the right of possession in the grantees and trustees, Mills and Tevis; and that the right of action in this case is vested in them alone. In *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 57, the supreme court of the United States held a similar instrument to be a mortgage. Says the court: "The instrument, we think, though in form a deed of trust, was substantially a mortgage." The dissenting justices, also, regard it as a mortgage. But the defendant urges, that the civil code of California controls the case, and that, under the code, the instrument is not a mortgage, but a deed of trust passing the legal title. Upon an examination of the instrument, and the provisions of the code, it seems to answer the description of a mortgage, as well as it does that of a trust deed. It is, certainly, "a contract by which specific property is hypothecated for the performance of an act, and without the necessity of a change of possession" (Civ. Code, sec. 2920); for no change of possession is provided for until a default; and not even then, unless a large portion of the holders of the bonds secured demand it. The "lien" created is also "special, and is independent of possession," as is provided in regard to a mortgage in section 2923. "A mortgage does not entitle the mortgagee to possession of the property unless authorized by express terms of the mortgage." (Sec. 2927.) "A power of sale may be conferred by a mortgage upon the mortgagee, *or any other person*, to be exercised after a breach of the obligation for which the mortgage is a security." (Id. 2932.) This instrument provides for taking possession by the grantees named in it after default, and not before, and confers a power of sale upon them in the contingencies specified, they being persons other than the persons for whose security it is intended, just as these provisions of the statutes say may be done. The statutory

definition of a mortgage does not say that the contract of hypothecation must be with the creditor, nor that the power of sale authorized to be given shall be given to him, but in express terms, that the latter, at least, may be to "*any other person.*"

So section 744 of the code of civil procedure provides, "that a mortgage of real property shall not be deemed a conveyance, *whatever its terms*, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale."

Under this provision conveyances absolute in form without any instrument of defeasance, if made to secure the payment of money, have often been held by the supreme court of California to be mortgages. This provision is a statutory recognition of the principle that mortgages may be made in various forms. Wherein, then, does the instrument in question fall short of being a mortgage within the definitions and various descriptions given in the several provisions of the statute cited?

But it may, also, contain the elements of a trust deed, as described in the statute, and fall within the definition of or embrace a trust. But is it any the less a mortgage? If the mortgage contains a power of sale to "any other person" than the mortgagee, and the code says it may, it necessarily embraces a trust; but it does not necessarily carry the right of possession and control of the land, at least, before default. The sole purpose expressly appears in every part of the instrument in question to be, to secure the payment of certain bonds, which are constantly and always in the instrument, and in the bonds themselves, called "*first* MORTGAGE bonds."

The authority from the board of directors to make the instrument, *recited in the instrument*, is *only authority* to execute a *mortgage;* and there is *no authority* recited to execute anything but a mortgage. And no other authority than that recited in the instrument appears in evidence. The resolution of the board of directors authorizing the transaction according to the recitals, is only to execute a mortgage. The parties evidently supposed it was a mortgage, and it

doubtless is a mortgage in substance, in law, and in fact, though it also creates a trust.

But suppose it creates a trust in the form in which the instrument is drawn, even under the provisions of the code cited, the result must be the same. The substantial title, and the present right of possession to the land under the express terms of the instrument, as executed, are in the grantor; and the trusts are limited by the terms of the instrument as expressly provided by the code. "Uses and trusts in relation to real property are those only which are specified in this title." (Civil Code, sec. 847.) And in the title it is provided, that "express trusts may be created for any of the following purposes:" 1. "To sell real property, and apply or dispose of the proceeds *in accordance with the instrument creating the trust*," etc., the power, if any, applicable to this case. (Sec. 857, as amended.)

By section 863 it is provided: "Except as hereinafter otherwise provided, any express trust in real property, valid as such in its creation, vests the whole estate *in the trustees*, subject only to the execution of the trust. *The beneficiaries take no estate or interest in the property*, but may enforce the performance of the trust." That is to say, whatever the estate is, be it more or less, that passes by the terms of the conveyance, it all vests in the trustees, and not in the beneficiaries. But what the extent—the quantity or quality—of the estate is, which passes to the trustees, depends wholly upon the terms of the instrument creating the trust. Its limits are defined by the terms of the instrument itself, and not by this provision of the code. The instrument having defined the estate, the whole of that estate, as so defined, goes to the trustees, and not to the beneficiaries. The beneficiaries take none of the estate as between them and the trustees, but only the right to compel the performance of the trust. This provision regulates the rights as between the trustees and beneficiaries, and not between the "*trustor*," as the grantor is termed in the statute, and *trustees*. Those rights are determined by the terms of the instrument, or, in the language of the code, as we have seen, "in accordance with the instrument creating the trust." The follow-

ing sections carry out this idea: "Notwithstanding anything contained in the last section, the author of a trust may, *in its creation*, prescribe *to whom the real property to which the trust relates shall belong*, in the event of the failure, or termination of the trust, and *may transfer, or devise, such property, subject to the execution of the trust.*" (Sec. 864.) "*The grantee or devisee of real property subject to a trust* ACQUIRES A LEGAL ESTATE *in the property*, as *against all persons* except the trustees and those lawfully claiming under them." (Sec. 865.) How do they get a *legal estate* in the property, unless their grantor, or devisor, has a legal estate in it?

And again: "Where an express trust is created in relation to real property, EVERY ESTATE *not embraced in the trust and not otherwise disposed of*, is left *in the author of the trust*, or his successors." (Sec. 866.) And, "When the purpose for which an express trust was created ceases, the estate of the trustees also ceases." (Sec. 871.) No reconveyance is here required. The interest of the trustees ceases *ipso facto* and instantly upon the performance or ceasing of the trust. If the trustor, or his grantee, has "a *legal estate* in the property as against all persons except the trustees," even as against the beneficiary, where does a mere trespasser against all—trustor, trustee, and beneficiary alike—obtain a *status* wherein he can question the right of the trustor? Now, all that has been granted by this instrument is, a security for the payment of the bonds described—a right to have the lands sold and the proceeds applied, *so far as is necessary*, to the satisfaction of the bonds. All else remains in the plaintiff. The plaintiff has the entire estate in the land, subject only to the right of the bondholders to have the bonds satisfied out of their proceeds, *in case some other provision for their payment is not made.* The right is, therefore, wholly contingent. The plaintiff can, at his option, provide other means for payment, and, upon such payment from other sources, the trust by express provision of both the statute and the instrument itself ceases.

The code, in another title and chapter, further provides: "The provisions of this chapter apply only to express

trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee." (Civil Code, sec. 2250.) And, "The *nature, extent*, and *object* of a trust are expressed *in the declaration of trust*." (Sec. 2253.) Again, "A trustee must fulfil the purpose of the trust, *as declared at its creation*, and must follow all the directions of the trustor given at the time of its creation," etc. (Sec. 2258.) And still again, "A trustee is a *general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other*." (Sec. 2267.) The provisions of this chapter, I suppose, refer to those trusts which are wholly for the benefit of third parties, wherein the title wholly passes to the trustee, there being nothing to be done for the benefit of the trustor—nothing left in, or to be returned to him; and not to that class of trusts, like the present, where the trustor is as much interested in the trust as the designated beneficiary himself—indeed, where he is the principal party in interest, and the beneficiary's interest is only an incident to some other right. Indeed, such is the express provision in section 2250. "Trusts created for the benefit of another than the trustor." But suppose it to be otherwise, the result would be the same; for in this class of trusts, as in that referred to in the other title of the code already cited, "*the nature, extent*, and *object of the trust*" *are limited to those "expressed in the declaration of trust*." The trustee must fulfil the purpose of the trust, *as declared at its creation*, and must follow all the directions of the trustor given at the time. "He is but a general agent of the trust property, and his authority is such as is conferred upon him by the declaration of trust, and by this chapter, and none other." (Sec. 2267.) "So in the other class of trusts already referred to, under which, if either, this case falls, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust." Thus, in either kind of trusts the rights and powers of the trustee under the code itself are defined and *limited* by the instrument creating the trust. What, then, are the purposes of the trust in question; and the powers, and the limitations upon those powers

of the trustees, Mills and Tevis? It is only necessary to glance at the passages of the instrument set out in the preliminary statement of the contents of the instrument, to find an answer to this inquiry. The express provisions of the instrument are so plain and specific, that they do not admit of construction, or doubt. The purpose, and only purpose, is, to secure the payment of a loan of money raised upon bonds issued and secured by what is substantially a mortgage, and put upon the market in the usual form adopted by railroad companies.

The lands of the company, as well as the road, rolling stock, and all other appendages and equipments, is conveyed with a condition of defeasance. The granting part as to the lands, is in the usual form of that class of real estate mortgages, except it says to "the said parties of the second part, *as trustees*;" and the *habendum* clause is, "unto the said parties of the second part * * * *as trustees*, for the uses and purposes, and upon the *trusts, terms, and conditions, and agreements, in this indenture set forth and declared.*" It is not for any other purpose than as set forth in the instrument. The defeasance is as follows: "Provided, always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with the interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then and from thenceforth *this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part.*"

The only change in this defeasance from the usual defeasance in an ordinary mortgage, is in form, not in substance. Instead of saying as in the usual form, "this indenture shall be null and void," the instrument says, "this indenture and the estate hereby granted shall cease

and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part." This is substantially the same as the provision of the statute already cited, which requires no reconveyance. It is true that further along in this instrument, there is another clause providing for a reconveyance, which under this provision, and the statute, seems to be superfluous.

But the instrument contains the following clause expressly limiting the rights of the trustees, "these presents and the bonds are made, executed, and delivered upon the trusts, terms, conditions, and *agreements* following, that is to say: That all the lands herein above conveyed and mortgaged shall be under the *sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same,* at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the *first and second parts*, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, *until entry or foreclosure by the trustees, as* HEREINAFTER PROVIDED. *But no title to any tract of land*, contracted to be sold *by the said party of the first part, shall be given until the whole of the purchase money of said tract shall be paid to said parties of the second part*, or their successors or survivors, in cash or in said bonds, or overdue coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands, as shall from time to time become subject to sale, to be carefully examined, and surveyed, and shall affix to each tract or parcel such price as in their judgment shall be most judicious, having *in view the interests of all parties;* and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor; the prices being, nevertheless, at all times subject to revision and alteration by the said *parties*, and the party of the first part *may reserve from sale any* lands necessary for depot grounds, or other purposes

connected with the construction or operation of the said railroad or telegraph."

Thus by the express terms of the trust, the lands hereinabove conveyed and mortgaged, are to "be under the sole and exclusive management and control of the said party of the first part"—the plaintiff herein—"until *entry and foreclosure* by the trustees AS HEREINAFTER PROVIDED," and the following is the provision hereinafter made: "If any default shall be made in the payment either of principal or interest on any of said bonds for six months, after demand at the place of payment when the same shall become due, *then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed*, and foreclose this mortgage; and *may sell, at public auction, so much of said lands as may be necessary to discharge all arrears of such interest*, and apply the proceeds, after deducting the costs, charges, and expenses of such entry, foreclosure, and sale, to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal, the principal sum of all bonds then outstanding shall become due and payable, *and the said trustees may enter into and take possession of all the lands* above by these presents mortgaged or conveyed, foreclose this mortgage, and sell, at public auction, all said lands, *or so much thereof as may be necessary*, first giving at least six months' previous notice of the time and place of sale, in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Los Angeles, and San Diego; and they shall apply the proceeds thereof, after deducting the costs, charges, and expenses of such last-mentioned entry, foreclosure, and sale, to the payment of all said bonds, then outstanding, and the interest accrued thereon, rendering the surplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute, and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and

privileges of the said party of the first part, in and to the property so sold, to the same extent as the same shall have been previously enjoyed and held by the said party of the first part."

"If, after any such entry shall be made, or any such foreclosure proceedings shall be commenced, for the satisfying of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, and deliver the coupons therefor to the said trustees, and pay all the costs, charges, and expenses incurred in such entry and foreclosure and the proceedings thereon; *then and in every such case the said trustees shall discontinue their proceedings thereon and* RESTORE TO THE SAID PARTY OF THE FIRST PART ALL OF SUCH LANDS *to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms, and conditions of these presents,* in like manner as if such entry had not been made, nor such foreclosure proceedings commenced."

So by the express terms of the trust, the trustees have no right whatever to enter into or take possession of any of the lands above conveyed, "until default," and not then, except "on being requested so to do by the holder of at least one hundred thousand dollars of such bonds." And even then they are only authorized to take possession of and sell "*so much of said lands* as may be necessary to discharge all arrears of such interest," costs, etc. But if default continues "for one year from the time of such demand and refusal, the principal shall become due, and *then* the said trustees may enter into and take possession of all the lands by these presents *mortgaged or conveyed, foreclose this mortgage,* and sell * * * so much thereof as may be necessary," etc. But, "if after such entry shall be made, or any such foreclosure proceedings shall be commenced for the satisfying of interest only, * * * and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, etc. * * * Then, and in every such case, the said trustees shall discontinue their proceedings thereon, and *restore* to the *said party of the first part all such lands,* to be held subject to the above convey-

ance and mortgage, and subject to all the provisions, terms, and conditions of these presents, in like manner as if such entry had not been made, nor such foreclosure proceedings been commenced."

Thus it appears, by clear, express, positive provisions of the instrument creating the trust, so plain that there can be no possible ambiguity upon the point, that the said trustees *had no right whatever to enter upon or take possession of said lands, or any portion of them,* until the contingency of a default and demand by the bondholders had arisen; and even then, upon the removal of the contingency by the plaintiff, they would be required to restore the management, control, and possession to the plaintiff. The *present possession,* management, and control of these lands were not any part of the estate conveyed to the trustees. "This estate" was not "embraced in the trust;" and, as we have already seen, under the code, "every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust." This estate was, therefore, left in the plaintiff, in this case —the author of the trust. In every aspect of the case, then, whether regarded as a mortgage or a trust, and no matter which class of trusts, the right of action to recover possession of the lands as against trespassers is left in the plaintiff. Any other construction would take the road and its equipments from the possession, management, and control of the plaintiff, contrary to the expressed intention, and give them to the trustees; and thus, not only prevent the company from operating the road already built, but, after the date of the instrument, prevent the construction and operation of any more road. It would defeat the very object for which the instrument was given, namely, to enable the plaintiff to build, equip, and operate the Southern Pacific railroad.

Although the proceeds of sales of lands go into the hands of Mills and Tevis for the redemption of the bonds, even the power of sale is not in them, except after default. It is the plaintiff "who shall have full power and authority to make contracts for the sale of the land." But it shall be "at such price, on such terms of payment, and such other conditions as shall be agreed on by the said parties of the

first and second part." Thus, while the management, control, and power to make the contracts is in the plaintiff, and not in the trustees, both the plaintiff and the trustees must agree on the price and terms and conditions of the sale; and as a mode for fixing the terms of sale, it is provided further in the instrument, that the plaintiff and the "trustees shall cause all such lands as shall from time to time become subject to sale, to be carefully *examined and surveyed, and shall affix to each tract* or parcel such price as in their judgment shall be judicious, *having in view the interests of all parties*, and said lands shall *be and remain at all times* thereafter open for sale to any person, who may desire to purchase and pay therefor, the prices being, nevertheless, at all times, subject to revision and alteration *by the said parties.*"

It is in pursuance of this provision, that the lands have been graded, and the prices fixed by the *plaintiff and the trustees* acting together, which prices appear to have created the great dissatisfaction in various ways manifested by the several defendants in these various suits.

Since the execution of this instrument, the fixing or changing of the established prices has been beyond the power of the plaintiff alone, without the concurrence of the trustees; and the trustees are bound by the express terms of their trust, to consult the interests of the beneficiaries, and of all the parties in interest, that is to say all parties having an interest under this instrument. These lands, according to their reasonable full value, are a part of the security upon which the purchasers of the bonds secured are entitled to rely.

Another limitation upon the ESTATE *and the* POWERS of the trustees is found in this instrument in the provision, that when any of these lands shall have been purchased and paid for, "*the same shall be conveyed by the said parties of the* FIRST *and second parts to the purchaser in fee simple.*" So that, the trustees have no power alone even to convey, except after default upon foreclosure and sale. This is another evidence of the care, which the plaintiff took to limit the extent of the estate, and the rights and powers, vested

in the trustees; and the limitations thus made in the instrument creating the trust must be the full measure of the rights and powers of the trustees.

The case of *Ellis* v. *Patterson* in this court cited by counsel presented no such question as that involved in this case. The instrument was different in its provisions, and the object of the suit was to set aside conveyances made by the trustee under the power contained in the instrument, and for an account and redemption.

All the other contested points in this case, both of law and fact, have been before decided in this court against the defendant. They are all, or nearly all, questions that can only be litigated in a special proceeding for the purpose either between the plaintiff and the United States, or between the plaintiff and the state of California. It is no part of the defendant's duty to vindicate the rights either of the United States, or the state of California; and he does not occupy a position that entitles him to do either.

Let there be findings and judgment in favor of the plaintiff in this and in the other cases submitted with it.

UNITED STATES *v.* CENTRAL PACIFIC RAILROAD COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
APRIL 17, 1882.

1. INDISPENSABLE PARTIES.—The owners of the land at the time of filing a bill in equity to vacate a patent of the United States, are indispensable parties to the bill; and when it is filed against the patentee alone, after he has conveyed the land and ceased to have any interest in it, the bill will be dismissed for want of necessary parties.
2. MOQUELAMOS GRANT.—Where a claim was filed for the confirmation of a Mexican grant of eleven leagues, within exterior boundaries containing three times that quantity of land, and the surveyor-general, in extending the public surveys, found the grant within the sphere of his operations, and surveyed it in advance of confirmation, in pursuance of the statute of 1852 (10 Stat. 90), reserving nearly double the quantity necessary to satisfy the grant, which survey was acquiesced in by the claimant, and the surplus surveyed into sections, platted, and returned to the land

office as public lands, which surplus was thereafter treated as public lands by the government, opened to pre-emption, offered for public sale by proclamation of the president, and afterwards opened to private entry and homesteads, patents being issued therefor for all such purposes, and to satisfy a congressional grant to the Central Pacific Railroad Company; *it seems*, that such surplus will be regarded as emancipated from the claim of the Spanish grant, and that the patents issued therefor in the usual course of the ordinary business of the land office, and to give effect to congressional grants as public lands, will be regarded as valid.

3. EX PARTE SURVEYS AS EVIDENCE.—*It seems* that an *ex parte* survey, made by direction of the commissioner of the land office, of the exterior boundaries of a rejected Spanish grant, many years after the rejection, and after the lands embraced in the supposed grant have been regularly officially surveyed and disposed of as public lands, is not admissible as evidence on the part of the government in a suit to vacate a patent.

Before SAWYER, Circuit Judge.

THE facts sufficiently appear in the opinion of the court.

Hon. Wayne McVeagh, attorney general, and Philip Teare, United States attorney, for complainant.

Tully R. Wise, for defendant.

SAWYER, Circuit Judge. This is a bill in equity to vacate and annul five several patents issued by the United States to the defendant under the act of congress granting land to aid in the construction of the Central Pacific Railroad, for something over fourteen thousand acres of land in the aggregate, on the ground that the patents were issued by mistake for lands not embraced in the grant by congress.

The patents respectively bear date April 9, 1870, April 3, 1872, February 28, 1874, November 23, 1875, and June 6, 1879. The lands are all odd sections, and lie within the limits of the grant designated in the act of congress. On September 22, 1852, Andreas Pico presented to the board of land commissioners for settling titles to lands in California, in pursuance of the act of congress of March 3, 1851, a petition for a confirmation of a claim to a grant of a tract of land, embracing eleven square leagues, called "Moquelamos." The description in the grant, as set out in the petition, is as follows: "Eleven square leagues on the river

Moquelumne, bordering upon the north upon the southern shore of said river; on the east upon the adjacent ridge of mountains; on the south upon the land of Mr. Gulnac, and upon the west upon the estuaries of the shore." There was no *diseño* accompanying the grant. The grant to Gulnac, referred to as the southern boundary, was surveyed in February and March, 1858, and the location became final by dismissal of the appeal in February, 1862, before the congressional grant to the railroad company by congress. Thus, at the time of the congressional grant, the northern, western, and southern exterior boundaries of the Moquelamos grant were fixed and certain, and the only point of uncertainty is the location of the eastern exterior boundary—"the adjacent ridge of mountains"—and its proper location would depend upon where the ridge is situated, and what points of the ridge are to be taken for the line. The range line of the public surveys, between ranges 7 and 8, crosses the tract of land now claimed by the complainant to be within the exterior boundaries of the Moquelamos grant, on such a line as leaves about ninety thousand acres to the west of said range line, and about sixty thousand acres to the east, making about one hundred and fifty thousand acres in the whole. The said range line, between ranges 7 and 8, lies further east than any point in the easternmost line of the lands of Mr. Gulnac—the Rancho el Campo de las Franceses—as finally located; and the final location of that grant corresponds very well with the *diseño* of the grant filed in the case. So that, between the said range line on the east, the lands of Mr. Gulnac, as granted and located, on the south, the estuaries of the shore on the west, and the Moquelumne river on the north, there are about ninety thousand acres of land, or about forty thousand acres more than enough to satisfy the grant—eleven square leagues, containing forty-eight thousand eight hundred and twenty-five and a fraction acres—or nearly double the amount called for by the grant.

To the east of said range line, between ranges 7 and 8, there are about sixty thousand acres claimed by complainant to be within the exterior boundaries of the Moquelamos

grant, bounded on the north by the Moquelumne, and on the south by the Calaveras rivers; but no part of it is bounded by Mr. Gulnac's land, either as finally located, or as shown on the *diseño* to the grant—said Gulnac's land all lying to the westward of said range line. About two thirds of the lands now in question lie in that portion of the assumed Moquelamos grant, which is east of said range line, between ranges 7 and 8, and about one third to the west of said range line.

In 1852 and 1853 the township lines were run by the United States surveyor-general, laying off all these lands within the boundaries of the Moquelamos grant, as claimed, into townships. In 1855 the section lines were run, and plats of the surveys filed in the proper land office, for all lands lying east of said range line, between ranges 7 and 8. From the time of the survey and filing of the plats, these lands, east of said range line, were treated as all other surveyed public lands by the United States Land Office, and all government offices having anything to do with them, and pre-emption claims, and, after the passage of the homestead laws, homesteads were recognized, proved up, allowed, and patented. In February—on the fifteenth and sixteenth of February, 1859—upon public proclamation made by the president of the United States, these lands were offered at public sale at the land office at Stockton and some sold and patented; and, after such public sale, the lands were opened for private entry to any parties desiring to purchase in the same manner as all other surveyed public lands are open to entry, after having been offered at public sale in pursuance of proclamation by the president; and many of them were so entered. In September, 1864, Messrs. Stanly & Hayes, attorneys for the claimant, in the case pending in the United States courts, for confirmation of the Moquelamos grant, addressed a communication, bearing date September 22, 1864, to the surveyor-general of the United States for the state of California, notifying him that the case was pending on appeal to the United States supreme court; that the land claimed lay on the Moquelamos river, and "includes and covers the land embraced in

township (2) two north, ranges 5, 6, and 7 east, Mount Diablo meridian; also township (3) three north, ranges 5, 6, and 7 east, Mount Diablo meridian; also township (4) four north, range 6 east, Mount Diablo meridian; part of township south of Moquelumne river; also township (4) four north, range 7 east, Mount Diablo meridian; part of township south of Moquelumne river; also township (4) four north, range 5 east, Mount Diablo meridian; part of township south of Moquelumne river."

They further notified the surveyor-general that the lands thus described were "not subject to entry or pre-emption," and requested him to suspend all proceedings in regard to pre-emption of "*said lands, or any part thereof, until the final determination of the claim.*" *On the notice* is indorsed, "Suspended September 21, 1864," one day earlier than the date of the notice. One of the dates is doubtless erroneous. On the same day the said surveyor-general addressed to S. F. Nye, register of the land office at Stockton, a communication, bearing date September 21, 1864, informing him that the "townships and plats of townships, including the lands described in the notice and request of Messrs. Stanly & Hayes," giving the same description as that contained in the notice, were "suspended to await the final determination of the boundaries of the rancho Moquelamos, now pending before the United States district court." The claim to the grant was finally rejected by the United States supreme court as fraudulent, February 13, 1865; and thereupon, the surveyor-general, on November 21, 1865, revoked said suspension. All of the lands described in said notice and request by Stanly & Hayes, in regard to which the surveys and plats were suspended, lie to the west of said range line, between said ranges 7 and 8, and within, and constitute the ninety thousand acres lying west of that line. Thus it appears that the attorneys of the claimant themselves limited their claim to lands lying west of said range line, between ranges 7 and 8, and only looked to those lands to satisfy this grant in case of a confirmation. There is no evidence that there was any other action on the part of the government, or any of its officers, reserving said lands or suspend-

ing action with reference to pre-emptions, homesteads, sale, or entry of them, or any part thereof, from the time of their survey in 1852 and 1855, down to the date of the withdrawal in consequence of filing the plat of the location of the Central Pacific Railroad, January 31, 1865, which was only thirteen days before the final rejection of the Moquelamos grant after it had been pending for about thirteen years. With reference to the land lying east of the range line, between ranges 7 and 8, the certificate of Otis Perrin, receiver, and George A. McKenzie, register of the Stockton land office, is as follows: "We do hereby certify that the records of this office show that no land was ever withdrawn or reserved for the 'Moquelamos grant claim,' east of the line dividing ranges seven (7) and eight (8) east of Mount Diablo meridian." Thus it appears affirmatively by the uncontradicted evidence, that prior to the issuing of the patents in question no action of any kind was ever taken by the government, or any of its officers, to reserve any portion of this land east of said range line for the satisfaction of the Moquelamos grant, or for any other purpose except to satisfy the railroad grant in question. On the contrary, these lands were townshiped in 1852, sectionized in 1855, thenceforth opened to pre-emption till February, 1859, when they were offered for public sale, and some of them sold at Stockton in pursuance of the proclamation of the president of the United States, and thereafter held open for homesteads, pre-emption, and private entry, like all other public lands of the United States. There is no legal evidence in the case that the eastern exterior boundary of the grant, or the "adjacent range of the mountains," is in fact east of the said range line, between ranges 7 and 8. All the evidence indicates that the Gulnac claim never extended east of that line, and there is nearly double the amount necessary to satisfy the Moquelamos grant, west of that line, that is, in fact, bounded on the south by the Gulnac grant.

The evidence claimed by complainant to be admissible to show the location of the "adjacent ridge of mountains," and the eastern exterior boundary of the Moquelamos grant, is a certified copy of a plat of a survey and location of that

line filed in the office of the surveyor-general of California, June 3, 1879, made in pursuance of the directions of the commissioner of the general land office, bearing date February 18, 1879. This proceeding is subsequent to the issue of these patents, and wholly *ex parte*. The Moquelamos grant had been rejected as frandulent fourteen years before, and all the lands affected by the survey had been surveyed into sections, and in all respects dealt with and treated as public lands by all departments of the government for about twenty-four years. Nearly all, if not quite all, had actually been patented by the United States to somebody. The statute authorizes the location of confirmed grants, but I know of none authorizing the location of rejected grants for any purpose, and especially for the location of the exterior boundaries of rejected Mexican grants many years after the rejection, embracing three times the amount of land called for by the grant. The lands were already officially surveyed and all, or nearly all, disposed of. The main purpose would seem to have been to make evidence for this contemplated case. Certainly, the United States land office can no more, properly, thus make legal testimony *ex parte* against grantees of the government to defeat grants already made, in contemplated suits, than any other grantor.

The answer alleges, and the uncontradicted testimony, also, establishes the fact, that all the lands included in the patents in question were conveyed by the Central Pacific Railroad Company, to *bona fide* purchasers before the filing of this bill. And, it also appears, that a very large portion, if not all the lands, were also conveyed by the grantees of the defendant to various parties, so that now the lands are in the hands of numerous purchasers, many of them holding in small parcels. At the commencement of this suit, therefore, the Central Pacific Railroad Company, defendant, did not own an acre of the land in question, and it had no interest whatever in this controversy.

In 1876, the supreme court decided the case of *Newhall* v. *Sanger*, 92 U. S. 761, in which it was held that the odd sections within the *exterior* boundaries of the alleged Mexican grant called Moquelamos, the claim for confirmation of

which had not been finally determined at the time of the withdrawal of the lands by the secretary of the interior in January, 1865, for the Central Pacific Railroad Company, were not "public lands" within the meaning of the act of congress, granting lands to that corporation, and were, therefore, not included in that grant—a majority of the justices taking a different view of that question from that taken, and still confidently entertained by me, and reversing the judgment of this court on that ground. That decision settles the law upon that point, so far as this court is concerned, and is controlling in all cases to which it is fairly applicable, and it is probably applicable to all those lands embraced in the patents now in question, lying west of the range line, between ranges 7 and 8. I think, however, that it ought not to be held applicable to those lands situated to the east of said range line. The description of the Moquelamos grant is not very definite as to its eastern boundary. There is no *diseño* to make it definite. The quantity is limited to eleven square leagues, and its southern boundary is the land of Mr. Gulnac, and the eastern exterior boundary, as claimed by complainant, would carry it some nine or ten miles east of the eastern boundary of Gulnac's claim, while there is nearly twice as much land west of the range line, between ranges 7 and 8, which has in fact, Gulnac's land for a southern boundary, as is necessary to satisfy the grant. Besides, the government of the United States surveyed the lands east of said range line as public lands, and in all its departments treated them in all respects like other surveyed public lands, opening them to pre-emption, offering them for public sale upon proclamation by the president, and, afterwards, to private entry and for homesteads, and actually patented all, or nearly all, which had gone into second and still other hands before this bill was filed, and reserved an ample amount within the undisputed exterior boundaries for the satisfaction of the grant.

The appropriation act of August 31, 1852, appears to authorize proceedings restricting the location to smaller limits than the exterior boundaries, and surveying the surplus as public lands. The provision of the statute is: "For sur-

veying private claims in California which may have been presented in good faith to the board of land commissioners, twenty-two thousand five hundred dollars. *Provided*, that the authority hereby conferred on the surveyor-general shall apply only to such *unconfirmed* cases as in the gradual extension of the lines of the public surveys he shall find *within the immediate sphere of his operations*, and which he is satisfied ought to be respected, and actually surveyed *in advance of confirmation.*"

In this case there was a claim for the unconfirmed Moquelamos grant pending before the board of land commissioners, which, "*in the gradual extension of the lines of the public surveys,*" the surveyor-general *seems to have found* "*within the immediate sphere of his operations, and which he was satisfied ought to be respected and actually surveyed in advance of confirmation.*" He accordingly surveyed it, leaving an ample quantity of, by far the best and most valuable portions of the land west of the range line mentioned, to more than satisfy the grant, sectionizing and platting the surplus—being that part situate to the east of said range line—as "public land," subject to be treated as other public lands, and returning the surveys and plats to the proper land office. This proceeding seems to have been authorized by the provision of the statute cited, and to have emancipated that portion of the land lying to the east of the range line, between ranges 7 and 8, from any further claim under the Moquelamos grant. If that be the effect, then there can be no question that these lands, at least, were subject to, and embraced in, the congressional grant to the Central Pacific Railroad Company.

The claimant of the grant himself, also, as we have seen, by his counsel, limited his claim to the lands so reserved for the purpose, lying west of the said range line, so that all parties in interest acquiesced in limiting the eastern exterior boundary of the land out of which the grant was to be satisfied to the said range line. Certainly, if the doctrine of estoppel applies to any case as against the United States, it ought to be made applicable here, where all parties, including the claimant himself, for so many years ac-

quiesced in accepting said range line as the eastern exterior boundary of the land within which the grant was to be located. Besides, as before suggested, there is no sufficient legal evidence as against the defendant, that the eastern exterior boundary is, in fact, east of that line. But conceding this recent *ex parte* survey to be legal evidence, it surely is not entitled to greater weight than the strictly official survey of 1855, executed under the express authority of the statute of 1852 cited, by which the eastern boundary of the tract out of which the grant was to be satisfied, was located at the range line, between ranges seven and eight, and which was ever afterwards, till after the issue of these patents, acted upon by the government, the claimant himself, and the people at large, as properly located.

Upon the facts disclosed in this case, it seems hardly consistent with good faith on the part of the United States, and scarcely worthy a great nation, at this late date, and after these lands have passed into the hands of numerous citizens as purchasers, to seek to vacate the patents upon which their titles rest. To many of these lands, especially to the west of the range line mentioned, a second patent has already been issued by the United States, and many of the occupants, it is generally understood, as a means of security from further annoyance, have acquired the title under both patents.

The reservation of the lands by which they were taken out of the railroad grant is not made in express terms by the statute itself, but it is worked out by construction from implications as to the policy of the government, drawn from other statutes relating to other objects, containing express reservations as to those particular objects, which to my mind are not very apparent, and are wholly unsatisfactory; and which did not command the assent of all the justices of the supreme court who sat in the case. Down to the decision in *Newhall* v. *Sanger*, the United States courts for the district of California, and the supreme court of the state—and they may be reasonably supposed to have been somewhat familiar with the condition of these matters—held the lands in question to be within the congressional grant. (*Sanger*

v. *Sargent*, U. S. circuit court, decided in September, 1874,* and other cases in that court.) The supreme court of California made a similar decision. (*C. P. R. R. Co.* v. *Yolland*, 49 Cal. 439, and other cases.) So, also, some of the justices of the United States supreme court itself, including the justice from this circuit, took the same view; and the executive department of the national government had early adopted, and for many years prior thereto acted upon that hypothesis. Even under the decision of the supreme court, had the location of the railroad by filing its plat occurred two weeks later, the congressional grant, under the law as it is, would have taken effect upon these lands. (*Ryan* v. *C. P. R. R. Co.*, 5 Saw. 261; affirmed, 99 U. S. 382.) Yet the only difference in the condition of the lands and the laws, as they were on the twelfth and fourteenth of February, is, that on the intermediate day, the baleful shadow of an overhanging fraud had been floated away by a final rejection of the Moquelamos grant. Under the decision of the supreme court, on the twelfth of February these lands *were not*, and on the fourteenth they *were* "*public lands*," within the meaning of the act of congress. Yet there had been no change in the title in the mean time. The rejection of the fraudulent claim only determined judicially where the title was. It simply adjudged that the claim was not valid, and, consequently, that the lands claimed then were, and that they always had been, a part of the public domain. There was no reservation for any other purpose than to ascertain whether they belonged to the United States or to private parties, and there was no necessity for a reservation for that purpose. Had the claim been confirmed, it would have taken sufficient land to satisfy the grant, whether reserved or not, as it would then have been adjudged to belong to the grantee and not to the United States. The act of congress only granted, and only purported to grant, lands that belonged to the United States, not those owned by private parties.

* NOTE.—The reporter deems it proper to append the decision upon this point in *Sanger* v. *Sargent*, referred to, as a part of the history of the question presented in this case, for the purpose of showing the grounds for confidence in the title on the part of purchasers. See page 93.

These observations are not made by way of criticism upon, or to question the propriety of, the decision of the supreme court, to which I yield implicit obedience, but to point the suggestions made respecting the consideration due from the government to the parties holding titles under the patents now in question.

Accepting the decision of the supreme court as correct, still considering these facts, and the action of the government itself upon the opposite construction for a long term of years—more than twenty years—the people who purchased are excusable, if they supposed these patents carried a good title. They ought, certainly, to be entitled to some consideration at the hands of the government. And even as to the lands west of the said range line, the government, as well as the courts, state and national, from the date of the rejection of the Moquelamos grant, till the case of *Newhall* v. *Sanger*—a period of ten years—took the view and acted upon it, that the odd sections were embraced in the railroad grant; otherwise, there would have been no occasion for this, or other suits, to vacate the patents issued in pursuance of that view.

But however the case may be on the merits, under the decision of *Newhall* v. *Sanger*, as to the lands lying east of the range line, between ranges 7 and 8, there is another point upon which the present bill must be dismissed, as to all the lands and patents in question. The Central Pacific Railroad Company is the only defendant, and before the filing of the bill, it had conveyed all the lands in question, and ceased to have any interest in the subject-matter in controversy. Not a person who had any interest in the matters in controversy when the bill was filed, has been made a party to this suit. The court is asked to vacate patents to large quantities of lands, held by numerous parties under these patents, without anybody having an interest in the lands being a party to the suit. The parties in interest are not only proper, but indispensable parties. No decree can be rendered annulling or affecting the title of parties to land without their presence. They are entitled to their day in court. (*Shields* v. *Barrows*, 17 How. 130; *Coiron* v. *Mil-*

laudon, 19 Id. 113; *Barney* v. *Baltimore*, 6 Wall. 285; *Bank* v. *Carrolton Railroad Co.*, 11 Wall. 625; *Ribon* v. *Railroad Companies*, 16 Id. 450; *Railroad Co.* v. *Orr*, 18 Id. 475.) The defendant in this suit having no interest in the subject-matter involved, is not even a necessary, if a proper, party to the bill to annul the patents. To vacate the patents on this bill, would be very much like foreclosing a mortgage upon lands, in a suit against a mortgagor not personally liable for the debt secured, after he has conveyed the mortgaged lands, without making the owner of the lands a party. All the indispensable parties are omitted from the bill, and those not necessary to be made parties are sued.

The bill must be dismissed on this ground, if on no other, and it is so ordered.

SANGER *v.* SARGENT.

SAWYER, Circuit Judge. The complainant filed his bill in equity against the defendants for the purpose of establishing his right to certain lands, which have been patented by the United States to the defendants, and procuring a decree for the conveyance of such title as passed by virtue of the patents. The complainant claims to be entitled to the lands by virtue of certain acts of congress, and transactions thereunder set out in the bill, and he alleges that defendants, notwithstanding his right to the lands, have wrongfully procured patents to be issued to themselves. The defendants demur to the bill, and the question to be determined is, whether the facts alleged taken to be true, entitle complainant to the relief sought. According to the allegations of the bill, complainant has acquired by proper mesne conveyances all the right, title, and interest vested in the Central Pacific and Western Pacific Railroad Companies, under the acts of congress granting lands to said corporations to aid in the construction of the Western Pacific Railroad. The right of the complainant depends upon whether the said corporations under which he claims, acquired a right to the land under the acts of congress set out in the bill. Section 3, of the act of July 1, 1862, "to aid in the construction of a railroad and telegraph line, from the Missouri river to the Pacific ocean," etc., provides as follows:

"That there *be* and *is hereby granted* to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy

transportation of the mails, troops, munitions of war, and public stores thereon, *every alternate section of public land, designated by odd numbers*, to the amount of *five alternate sections per mile on each side of said railroad*, on the line thereof, and within the limits of ten miles on each side of said road, *not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed.*" (12 Stat. 492.)

That this section constitutes a *present* grant of the number of sections mentioned, which becomes definitely attached to the specific alternate sections situate within the limits prescribed in the act, not reserved, or excepted by virtue of the words of reservation or exception, as soon as "the line of said road is definitely fixed," there can be no doubt. This is both clearly apparent from the language of the act itself, and is thoroughly settled by judicial construction in many cases wherein the language is precisely similar. (*Doll* v. *Meader*, 16 Cal. 315; *Van Valkenburg* v. *McCloud*, 21 Id. 335; *Higgins* v. *Houghton*, 25 Id. 255; *Bludworth* v. *Lake*, 33 Id. 261; *Chapman* v. *School District et al.*, 1 Deady, 108; *Lamb* v. *Davenport*, 1 Saw. 632; *Central Pacific R. R. Co.* v. *Dyer et al.*, Id. 652; *Lessieur* v. *Price*, 12 How. 75, 76; *Foley* v. *Harrison*, 15 Id. 446; *Railroad Co.* v. *Smith*, 9 Wall. 97, 99, 100; *Railroad Co.* v. *Fremont County*, 9 Id. 94, 95.)

This grant could only be defeated by a failure to perform the conditions of building the road as prescribed. When the line of the road became "*definitely fixed*" in the mode prescribed, the right of the railroad companies under which complainant claims, attached to every alternate section of the public land within the limits prescribed of ten miles on each side of the road, which was not mineral lands, had not at that time been "sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim," or some other right under the statutes, had not attached. A subsequent act extended the grant to *ten*, instead of *five*, sections, to be selected within *twenty* miles on each side of the line, and defined the exceptions in more specific terms, which in no way affect the question at issue. Upon the filing by the company of a map designating the general route of the road, the act with the amendments, also authorized the secretary of the interior to withdraw the land within twenty-five miles of such designated route from pre-emption, private entry, or sale. The bill alleges, that said map was filed, designating the general route, October 5, 1864; and that on December 1, 1864, the secretary of the

interior withdrew the lands within twenty-five miles of the route so designated from pre-emption, private entry, or sale.

The bill avers that the lands in question are within the prescribed limits; were, at the time of the said withdrawal, and "*at the time when the line of the said road was definitely fixed,*" public lands of the United States, and were alternate sections designated by odd numbers, and not within any of the said exceptions mentioned in any of the said acts. If this be so, then, the right of the company vested and became perfect, and it was entitled to a patent upon fulfilling the prescribed conditions, and no other party could acquire any right under the laws in force against the said railroad corporations, after the line of the said road became "definitely fixed," and the grant had become thus attached to these specific tracts. (See cases before cited.)

The only ground upon which it is claimed that these lands are within the exception, and, therefore, excluded from the grant, is, that they had been "*reserved.*" The bill alleges in direct terms that they had not been reserved. The bill, however, makes the further allegation, that the *only* reason that patents were not issued to complainant was, "that at the date of the final location of the road, there was a claim to said land, under a Mexican grant, which said claim was without any foundation, and was wholly void, and was finally rejected by the supreme court of the United States in December term of 1864, long before said portion of said road was completed that gave the right to the said lands; and the said Mexican claim was rejected because the alleged grant on which the claim was founded, was a fraud, and was absolutely void." That it was pretended by the officers of the government, "that the fact of said lands being so claimed, made them '*reserved*' under the act of congress, whether said claim was just or unjust, legal or illegal, and that on this account alone," the issue of a patent to complainant was refused. This allegation presents the only other question in the case on the merits, viz.: whether the mere fact that the lands in question at the time of the filing of the map required; the time of the withdrawal from pre-emption, private entry, or sale; and the time of the final location of the line of the road, were within the exterior boundaries of a tract claimed under a Mexican grant, whether fraudulent or genuine, of itself constitutes them *lands* "*reserved,*" within the meaning of the section making the grant. It does not appear, and it is not claimed, that before said definite location, or at any time, there was, in fact, any actual order of the president, or of

any department, or officer of the government, authorized to make one, made, reserving these specific lands, or any lands within the external boundaries of this pretended grant.

That the lands were public lands there can be no doubt. The fact that they were claimed under a fraudulent and invalid Mexican grant, did not prevent them being public lands. The final rejection of the grant did not change the ownership of the lands from the claimant to the United States. It was only an adjudication—a judicial determination—that the grant was invalid, and that the claimant never had any right whatever, legal or equitable, entitled to recognition under the treaty with Mexico; or, in other words, an adjudication in a litigation between the only party setting up any claim, and the United States, that the entire title was in the United States; and that the lands were *public*, *not private*, lands. There being no right or title to these lands in any private individual, the proposition that they were always a part of the public domain, or public lands of the United States, from the time of their cession by Mexico, seems to be so clear, that no argument can make it plainer. If a confirmation relates to, and takes effect from, the date of the filing of the petition, or the date of the grant, as held in many cases, a rejection must have the same relation. But there is no occasion to apply the doctrine of relation. Being public lands they were subject to grant, and were granted, unless within some one of the exceptions made in the granting act. It is not pretended that they are within any exception, unless it be under the head of "reserved" lands.

As before stated, it is not pretended that there was any specific order by any competent authority reserving these lands, or any lands embracing these, or that they are reserved at all, unless by force of some statute without any further act by any department, or officer of the government. No statute has been called to my attention, reserving them in express terms from this grant to the railroad, in consequence of their being within the external limits, or otherwise, of an invalid Mexican grant. The word "reserved," itself, as used in the railroad acts, does not profess to point out what lands are reserved, within the meaning of the act. It does not attempt to *define* "reserved" land. It does not include any lands not reserved already by other acts, or other words or provisions than the word itself. In other words, we must go outside of that word, "reserved," as there used, to other acts, to find the lands intended to be designated by it. And going outside of this word, I have referred to no statute, and I have not found any, that

appears to me to reserve these lands from grant. I find nothing in the act of 1851, to settle private land claims in California, reserving any lands of the United States from any grant that congress may see fit to make. So far as I am aware, that act is the first one passed affecting the titles to lands in California. There were no public lands at that time open to sale, or pre-emption, in the state of California. There were at that time no means by which private rights not already vested or initiated under the laws of Mexico, could be acquired in any of the public domain of California. As the said act did not provide for any disposition of the public lands, other than to ascertain what grants had already been made by the Mexican government, and to perfect the rights inchoate, or otherwise, in the said grants, and there was no other law by means of which any pre-emption or other rights could be acquired in the public lands of California, and the president having the power already to reserve any land for the government's specific uses, there was no occasion for making any general reservation in that act to avoid future complications, and none was made. The whole scope and purpose of the act was to ascertain what lands belonged already to private parties, and what to the public domain; and this object must be kept in view in its construction. The disposition of the public lands to private parties was left for future legislation.

The next act, so far as I am advised, affecting the public lands in California, is in the appropriation made for the survey of the public lands in that state in 1852. (10 Stat. 90, 91.) This act authorizes the dividing of a certain amount of the public lands into townships and sections. Also, the survey of private claims under Mexican grants presented in good faith for confirmation. But it only authorizes the survey of such *unconfirmed* grants "*as the gradual extensions of the lines of the public surveys as he (the surveyor-general) shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected and actually surveyed in advance of confirmation.*" What does this mean? Certainly, not that all lands within the exterior boundaries of a Spanish grant shall be reserved from survey, or reserved at all. On the contrary, it expressly authorizes the surveyor general, when, in extending the lines of the public surveys, he comes upon an unconfirmed Spanish grant of the usual kind, which he is satisfied is good, and ought to be respected, to survey it, "in advance of confirmation," in order that he *may survey as public lands the surplus, after satisfying the grant*, and thus prepare it for sale as soon as congress

should see fit to authorize its disposition. Congress had no idea, in passing this act, that all lands within the *exterior* boundaries of a grant which sometimes embraced ten times the amount of land required to satisfy the grant (and in one case, the whole state of California [see *Yturbide* v. *United States*, 22 How. 29, and *Fremont's Case*, 17 Id. 573*]), had been reserved for any purpose, and certainly up to this time, there had been no such reservation.

The act of March 3, 1853, "to extend pre-emption rights to certain lands therein mentioned" (10 Stat. 244), clearly has no application. It had reference to prior legislation applicable to lands in the older states. There was nothing, at the time of the passage of the act, in California, to which it could apply. But afterwards, on the same day, the next act was passed by congress, relating to lands in California—the act of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes" (10 Stat. 244–248). This appears to be the first act under which rights in the public lands, as against the United States, could be originally acquired, and this act relates to this specific subject-matter, and covers and disposes of the entire subject for the present. Section 6 of this act extends the right of pre-emption to California, and excepts from the right of "*pre-emption* lands claimed under any foreign grant or title." But this act makes no exception of such lands, as such, from any other grant that congress may afterwards see fit to make. Its exception only applies to *pre-emption*, and other rights to be acquired *under that act*. Besides, the act itself, clearly shows that lands claimed under Spanish grants are not intended by congress to be included under the head of "*reserved*" lands; for the language of this act is, "with the exception of lands * * * *reserved by competent authority*," and then adds, "and excepting *also* the *lands claimed under any foreign grant or title*." If it had been supposed that the lands within the exterior boundaries of a Spanish grant would be included in the words "reserved by competent authority," the last clause would have been useless. It was not so supposed, but it was intended to add something else. The word "and" indicates some additional lands. The other word, "also," as its definition

* NOTE.—The grant to Yturbide was finally rejected in 1860, only, about two years before the date of the railroad grant in question, in *Newhall* v. *Sanger*. Had the final rejection been accidentally delayed till July 2, 1862, not a foot of land in California would have passed to the railroad company under the decision in *Newhall* v. *Sanger*, and the whole grant would have been defeated by the judgment of the court.

indicates, shows, too, that there was to be something "further," something "in addition to" the lands already included in the word "reserved," excepted from pre-emption rights; and these further or additional lands were "lands claimed under any foreign grant or title. All these lands were excepted from the operation of *the pre-emption laws*. They were not reservations. There is a clear distinction between reservations and exceptions. Reservations, in the sense here used, are clearly, "tracts of the public lands reserved for some specific use" (Webster's Dic.), such as for forts, military purposes, Indians, and the like, or lands reserved generally *in express terms*.

All reservations of this kind, and also lands claimed under Mexican grants, were alike "excepted" from the operation of the pre-emption laws. Lands "reserved by competent authority," were excepted, and so were lands claimed under Spanish grants *excepted*, not *reserved*. So, in like manner, under the railroad acts in question, the term "reserved," is manifestly used in the same sense, and all lands so "reserved," sold, or otherwise disposed of, all lands to which a pre-emption or homestead right had attached, *were excepted* from the operation of the grant.

The act of congress in relation to Mexican grants *in New Mexico*, also, provides that: "Until the final action of congress on *such claims, all lands covered thereby shall be reserved from sale or otherwise disposed of by the government, and shall not be subject to the donations granted by the provisions of this act.*" (10 Stat. 309, sec. 8.) This is as specific on this point as the act extending pre-emption rights to California.

Thus it is apparent that whenever congress designs to except from the operation of any legislative grant, or reserve from sale, those portions of the public lands lying within the bounds of any tract claimed under a Mexican grant, it has no difficulty in finding and using apt language to express the intent clearly and explicitly; and with these *former acts* before that body, it can hardly be supposed that congress would have failed to use appropriate words to exclude this class of lands in the railroad grants, had such been the design. As their lands are not in terms excepted, it must be held that congress did not intend to exclude them from the operation of the grant. I have mentioned the only acts relied on, and they are the only ones I have found, from which a statutory reservation can be deduced, independent of any specific order by some officer of competent authority reserving the lands. It is not pretended that there is found any express reservation in either, or all, of these acts; and to my mind none can be implied by any reasonable construction.

Besides, I find nothing in the policy of the grant that would justify any such strained construction or implication. The policy of the act was, to give to the railroad company every alternate section of the public domain within ten miles on each side of the road, to which no private right had attached, and not already appropriated to some specific public use, to aid in the construction of this great public improvement. The donation was designed to be, and was, liberal. If reservations of this kind could be worked out by shadowy implications, in extended sections of the country, there would be no land granted, and no aid thereby conferred. This grant is to receive a reasonable construction, in view of the public object to be accomplished; and so construing it, it is obvious, that the act granted everything within the general descriptions not taken out by specific enumeration. And the lands in question are, in my judgment, clearly, not within the meaning of any one of the classes enumerated. The railroad act does not define its exceptions by reference to the *pre-emption* laws as a test. It names specifically each class intended to be excluded, and each has a subject-matter upon which it can clearly operate, without embracing lands of the class in question. I am satisfied that the lands in question are within the grant to the Central Pacific Railroad Company.

UNITED STATES *v.* DANIEL SMITH.

CIRCUIT COURT, DISTRICT OF OREGON.
APRIL 21, 1882.

1. TIMBER ON PUBLIC LANDS IN OREGON.—The act of June 3, 1878 (20 Stat. 88), giving permission to the residents of Colorado, Nevada, the territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such state is regulated by the act of the same date (20 Stat. 89), providing, among other things, for the sale of timber lands therein.
2. MINERAL DISTRICT.—This term, as used in the first of the said acts of June 3, 1878 (20 Stat. 88), has no application to Oregon, there being no such division or district of the state established, either by law or common reputation.
3. CUTTING TIMBER—WHO MAY AND WHAT FOR.—Under the act of June 3, 1878 (20 Stat. 89), persons occupying the public lands in Oregon under the mining, pre-emption, or homestead laws of the United States, may

cut and use the timber thereon convenient for the purposes of such occupancy, and may also take other timber from the public lands, if need be, sufficient to maintain the necessary improvements on the lands so occupied; but any cutting or removing timber from the public lands otherwise than this—as with intent to dispose of or wantonly to destroy the same, is a trespass, for which the party guilty of the same is liable, civilly and criminally. (20 Stat. 90.)

Before DEADY, District Judge.

J. F. Watson, for plaintiff.

John J. Balleray, for defendant.

DEADY, J. This action is brought by the United States to recover from the defendant the sum of ten thousand dollars damages for wrongfully cutting and carrying away certain timber, between January 1, 1879, and the commencement of the action—August 17, 1881—then being and growing upon that parcel of the unsurveyed public lands of the plaintiff, situated in Baker county, Oregon, which, if surveyed, would be township 11 south, of range 40 east, of the Wallamet meridian, with intent to dispose of the same; and for that he "did convert and dispose of the same."

The defendant, for answer to the complaint, denies the allegations thereof, and for a further answer says—that at the time of committing the alleged unlawful acts the defendant was a citizen of the United States, over twenty-one years of age, and a *bona fide* resident of "a mineral district of the United States," consisting of Baker, Grant, Union, Umatilla, and Wasco counties, the same being "the fourth mineral district of the United States in the state of Oregon," and that while he was such a resident he did enter upon the unsurveyed tract of public land aforesaid, the same being within said mineral district, and "cut and remove therefrom a small number of trees growing thereon;" that said tract of land was mineral land, and not subject to entry under any law of the United States, "except for mineral entry;" that said trees were "cut and removed, and actually used for building, agricultural, mining, and do-

mestic purposes, by defendant and others, within said mineral district;" and that the cutting and removing of said trees constitute the trespass mentioned in the complaint.

The plaintiff demurs generally to this defence. The first act of congress which in terms authorized or permitted the cutting of timber upon the public lands by a private person, for any purpose, was passed June 3, 1878 (20 Stat. 88), and is entitled, "An act to authorize the citizens of Colorado, Nevada, and the territories, to fell and remove timber on the public domain for mining and domestic purposes."

This act contains three sections. The first one authorizes any *bona fide* resident of the states aforesaid or either of the territories—naming them—"and all other mineral districts of the United States," "to fell and remove for building, agricultural, mining, or other domestic purposes," any trees growing upon the public lands, "said lands being mineral," and not then subject to entry, "except for mineral entry;" subject to such regulations as the secretary of the interior may prescribe for the protection of the timber upon said lands and other purposes—with a proviso, that the act should not "extend to railroad corporations."

The second section makes it the duty of the officers of any local land office "in whose district any mineral land may be situated," to ascertain whether timber is cut or used upon such mineral lands, "except for the purposes authorized by the act," and to give notice thereof to the commissioner of the general land office.

The third section prescribes the punishment for a violation of the act or the rules made in pursuance thereof.

The act is very loosely and unskillfully drawn, and abounds in unnecessary and indefinite phrases and clauses of the and-so-forth character. The privilege conceded by it is limited to citizens of the United States—"and *other* persons" resident in certain states and territories, naming them, "and all *other* mineral districts of the United States." It allows timber, "or *other* trees," to be cut for building, agricultural, mining, "or *other* domestic" purposes, subject to such regulations as the secretary of the interior may pre-

scribe for the protection of the timber and undergrowth, "and for *other* purposes."

On the same day another act was passed (20 Stat. 89), entitled—"An act for the sale of timber lands in the states of California, Oregon, Nevada, and Washington territory." This act contains six sections. The first, second, and third ones provide for the sale of the "unsurveyed public lands" within these states and this territory not included in any reservations of the United States, valuable chiefly for timber or unfit for cultivation, which have not been offered for sale, in quantities not exceeding one hundred and sixty acres to one person or association at the minimum price of two dollars and fifty cents per acre—with a proviso, that the act should not, among other things, authorize the sale of a "mining claim" or "lands containing gold, silver, cinnabar, copper, or coal."

Section 4 provides—"That after the passage of this act it shall be unlawful to cut or cause or procure to be cut or wantonly destroy *any timber growing on any lands of the United States*," in the states or territory aforesaid, "or remove, or cause to be removed, any timber from such public lands with intent to export or dispose of the same," * * * and that any person so offending shall, on conviction, be fined, for every such offense, not less than one hundred dollars or more than one thousand dollars, with a proviso that the act shall not "prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage, or from taking the timber necessary to support his improvements."

Section 5 provides for the relief of persons prosecuted in said states and territory for the violation of the timber act of March 2, 1831 (4 Stat. 472, sec. 2461 R. S.), and repeals section 4751 of the revised statutes, providing for the disposition of penalties and forfeitures incurred under said act or section, and directs that all moneys collected under that act shall be covered into the treasury of the United States.

Section 6 provides that all acts and parts of acts inconsistent with such act are repealed.

In support of this plea or defense counsel for the defendant contends: 1. That the first named act applies to Oregon, as well as the states and territories therein expressly named, because it is included in the phrase—"all other mineral districts of the United States;" and 2. That the permission contained in the first section of such act to fell and remove timber is not limited to the land occupied by the party cutting or removing it, nor to the quantity needed for his individual use, but that it is a license to every resident of a "mineral district" so called in the United States to fell and remove all the timber he may from any portion of the public lands in such district, whether mineral, agricultural, or timber, to be used by any one within the district for building, agricultural, mining, or other domestic purposes; and further, that the second act, although made applicable to Oregon by name, in no way affects or limits the operation of the first one therein.

If this is the law, then all the timber on the public lands in Oregon may be cut and removed therefrom with impunity; provided, it is not done for the purpose of being exported from the state or mineral district where cut. No adequate reason is given or suggested why congress should thus suddenly depart so far from the traditional policy of the government to preserve the timber on the public lands for the use of those to whom it might ultimately dispose of them.

The argument hinges upon the meaning and application of the phrase "mineral district." The use of it in the United States statutes is new and confined to this act. As a matter of fact, so far as appears, there is no section of this state known and defined as the mineral district. Being known neither in law nor fact as the designation of any well-defined or exact locality, it is as void of meaning and incapable of application as the phrase "tree district," "stone district," "alkali district," or "water district."

The title of the act does not contain the phrase, but limits its operation to the citizens of Colorado, Nevada, and the territories; and it is not probable that there was any thought in the mind of congress of extending it any fur-

ther. The phrase "mining district" is well known, and means a section of country usually designated by name and described or understood as being confined within certain natural boundaries, in which gold or silver or both are found in paying quantities, and which is worked therefor, under rules and regulations prescribed by the miners therein—as the White Pine, the Humboldt, etc. This term and the thing signified by it are also recognized by the United States statutes, secs. 2319, 2324 of the R. S.; Copp's U. S. Min. Lands, 471.

There is no method of proceeding known to the law by which a district of country can be prospected, surveyed, and established or declared to be a "mineral district." The ordinary surveys of the public lands do not include any examination or exploration of them for mineral deposits—the surveyor being only required "to note in his field-book the true situation of all *mines*, salt licks, salt springs, and mill-seats which come to his knowledge." (Subd. 7, sec. 2395 of the R. S.)

By section 12 of the act of May 10, 1872, entitled "An act to promote the development of the mining resources of the United States" (17 Stat. 95; sec. 2334 of the R. S.), it is provided that the surveyor general "may appoint in each *land* district containing mineral lands, as many competent surveyors as shall apply for appointment to survey mining claims." This "land district" is a division of the state or territory as the case may be, created by law, in which is located a land office for the disposition of the public lands therein.

There are four of them in this state. It is probable that these "land districts" in the mining states like Colorado and Nevada, were sometimes familiarly spoken of as "the mineral districts," from whence the phrase found its way into the act of June 3, 1878. But although there are "some mineral lands" and "mining districts" in Oregon, it is not known that there is any considerable or contiguous section of the country, to which the term "mineral district" could properly be applied, and it is certain that there is none to which it is applied by law.

It may be admitted that the use of the general words, "all other mineral districts of the United States," immediately following the enumeration of the particular states and territories mentioned, is some evidence of an intention by congress to extend the operation of the act beyond the limits of said states and territories. But the difficulty is, that the language used has no definite signification or local application, and therefore must fail to have any effect, for want of certainty.

Besides, this act is one in favor of individuals, and in derogation of the rights of the public—the whole people of the United States—to whom these lands and timber belong, and, therefore, is not to be enlarged by construction so as to include things or persons not expressly enumerated, mentioned, or described therein with reasonable certainty. (Smith's Com., sec. 738 *et seq.*) For these reasons the act, in my judgment, is not applicable to Oregon, but is confined to the states and territories therein expressly mentioned.

By act number 2 of the said acts of date of June 3, 1878, it is declared unlawful to cut *any* timber on *any* of the public lands in Oregon, with the exception of that cut by a "miner or agriculturist," in the ordinary working or clearing of his mining claim or farm, or that taken therefrom to support his improvements on such claim or farm. This provision is inconsistent with and repugnant to the license to cut timber contained in act number 1. Either the prohibition contained in act number 2 must be limited and restrained by construction, so as not to apply to mineral land, land subjected to "mineral entry," or act number 1 must be held not applicable to Oregon. Both cannot be in full force in the same place. It may be said that number 2, being subsequent in point of place in the statute, is presumed to have been passed subsequently to the other, and therefore repeals, or modifies it, so far as they are in conflict.

But both acts being passed on the same day, and measurably upon the same subject, I think they may best be considered as parts of one act, and each be allowed to stand

and have effect as far as it can without conflict with the other.

It cannot be said that, in passing act No. 1, congress expressly included Oregon in the license therein given to cut timber on the public lands, and it is only claimed that it contains some general words which may be interpreted so as to include it, while upon the very face of the act it is plain that in the passage of No. 2, it was the intention of congress to regulate the subject of the sale and use of the timber upon any of the public lands in Oregon. This being so, the only reasonable conclusion is, that act No. 2 excludes No. 1, even if there was any ground for holding the latter applicable to this state under any circumstances. The subject is fully regulated by the former act, and there is nothing left for the latter one to operate upon without displacing some provision of the other. The provision for the sale of timber lands, for the prevention of cutting timber on the public lands, and for allowing the miner and farmer to cut and use the timber on their claims, and to take it from the public lands for the improvement of such claims, covers the whole ground, and if allowed to be in full force here, must exclude the Colorado act from the state.

The plea is insufficient. A defence to an action for unlawfully cutting timber on the public lands in this state, must show that it was cut upon the mining or farming claim, or land of the defendant in the ordinary course of working the same or preparing it for tillage, as the case may be, or was taken from the public lands for the necessary improvements thereon.

It does not appear from the plea herein, that the defendant cut the timber in question from land then occupied by him for the purpose of mining or agriculture, or that it was cut from the public lands for maintaining the necessary improvements thereon.

From all that appears, the defendant was unlawfully engaged in cutting timber from the public lands, and is at least liable to the plaintiff in damages equal to the value thereof.

The demurrer is sustained.

UNITED STATES *v.* JOSEPH D. YOUNG ET AL. UNITED STATES *v.* JERRY C. WHITE.

DEADY, J. These two actions are also for trespasses upon the public lands in Baker county, and the demurrers to the defenses thereto were argued and submitted at the same time as the demurrer in the foregoing one.

In the first the plaintiff claims three thousand dollars damages for the unlawful cutting of timber on that portion of the public lands that would, if surveyed, be township 10 south of range 37 east of the Wallamet meridian, with intent to dispose of the same, since January 1, 1879.

The defense is, that in 1872 each of the defendants entered upon one hundred and sixty acres of public land, which, if surveyed, would be in township 9 south of the range and meridian aforesaid, with intent to pre-empt the same, and erected thereon a dwelling-house and other improvements of the value of four thousand dollars, with timber cut therefrom; that in the same year the defendants located a placer mining claim in said township 9 and within a mineral district of the United States, of not more than one hundred and sixty acres, for which they have since obtained a patent from the United States, upon which they cut timber to work the same, and for the improvement of their agricultural claims, within the dates alleged; that the defendants, being citizens of the United States and residents of said township 9, did within the dates alleged in the complaint enter upon and cut and take from certain mineral lands situate in said township and adjoining the mining claim of the defendants, for building, mining, agricultural, and domestic purposes, "certain trees and timber being and growing" thereon, amounting to one hundred thousand feet, which "trees and timber" were used for the purposes aforesaid; and that these acts are the same as those complained of by the plaintiff. This defense has been pleaded and treated by counsel as one, but it really contains three separate defenses to three distinct supposed trespasses.

To the first and second the demurrer is not well taken. The defendants were authorized to cut the timber upon their pre-emptions and mining claim as they did either under section 4 of the act of June 3, 1878, *supra*, or if cut prior to that time, then under the construction given by this court in *U. S.* v. *Nelson*, 5 Saw. 68, to the act of March 2, 1831 (R. S., sec. 2461), to the effect, that congress by the enactment of the pre-emption, homestead, and mining laws, had so far modified that act, that pre-emptors and others occupying public lands under such laws might cut and use the timber thereon for the purposes of such occupation.

But to the third defense the demurrer is well taken. The timber thereby admitted to have been cut was not cut upon the mining or agricultural claims of the defendants, nor upon the public lands for the necessary improvement of said claims, but upon lands unoccupied by the defendants and for sale or disposition to the public. For the averment that they were cut and used for "building, mining, agricultural, and domestic purposes" comes far short of saying that they were so used by the defendants exclusively or at all. And if it should even be construed as an allegation that the timber was used by the defendants, still it is not sufficient, as they were only permitted to take such timber from the public lands as might be necessary to maintain the improvements on their mining and agricultural claims.

In the second the plaintiff claims three thousand dollars damages also for cutting timber on public lands in what would be, if surveyed, township 11 south of range 42 east of the meridian aforesaid, since January 1, 1879.

The defense in this case is, that at the date of the commission of the acts complained of, the defendant was in partnership with H. C. Hines, both of whom were American citizens and residents of the township aforesaid and within a mineral district of the United States, and being so, caused to be cut upon the public lands in said township timber to the amount of seventy-five thousand feet, which was used for building, mining, agricultural, and domestic purposes within said mineral district.

This is simply a case of cutting timber on the public lands for sale or disposition to the public within the land district where cut, and under the ruling in *Smith's Case*, is a trespass for which the defendants are liable to the plaintiff in damages equal to the value of the timber cut.

The demurrer is sustained.

MAX GOLDSMITH *v.* MARTIN SACHS ET AL. ISAM WHITE *v.* MARTIN SACHS ET AL. LEVY WHITE *v.* MARTIN SACHS ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
MAY 15, 1882.

1. CONTRACT FOR FUTURE PARTNERSHIP.—Where several parties agree to enter into partnership on a future day, but a part refuse to enter upon the business in pursuance of the terms agreed upon, and the partnership is never launched, whereby the others are injured, the only remedy is an action at law for the breach.
2. SAME—PARTIES.—Where seven *parties* agree to enter into a partnership at a future day, the language being, "they have agreed to become partners," and four out of the seven, afterwards, jointly refuse to enter into the partnership, and thereby commit a breach, by reason of which each of the others sustains several, but no joint damages, each party so sustaining several damages may maintain an action against the parties jointly committing the breach, without joining, either as plaintiffs or defendants, the others who have committed no breach.
3. PARTIES JOINTLY COMMITTING A BREACH of a contract may all be joined as defendants.
4. VOID FOR UNCERTAINTY.—Where the contract provides, that "the business of the partnership shall be buying, selling, and dealing in dry goods, and furnishing goods, and such other merchandise as may be convenient and profitable to all parties concerned," the description of the business is not so vague and indefinite as to render the contract void for uncertainty.
5. DAMAGES.—Where the complaint presents a case for some damages, even, if only nominal, it is not necessary, on demurrer, to determine the rule of damages.
6. JOINT AND SEVERAL CONTRACTS.—Rule in regard to parties stated, where contracts are not in express terms, either joint or several; or when a contract will be regarded as joint; and when as several.

Before SAWYER, Circuit Judge.

DEMURRER to complaint. The facts sufficiently appear in the opinion of the court.

McAllister & Bergin, for plaintiff.

Wilson & Wilson, for defendants.

SAWYER, Circuit Judge. This is an action on a contract to enter into a partnership, which the defendants are alleged to have refused to carry out. They contend that the partnership never went into effect, and, consequently, that there are no partnership affairs to settle up. It is, also, correctly contended, that only an action at law will lie for the breach. But this is an action at law by one of the parties against several of the others, who are alleged to have refused to go on with the partnership. The parties to the contract are Isam White, E. L. Heller, S. W. Heller, Martin Sachs, Sanford Sachs, Max Goldsmith, and Levy White.

This action is by Goldsmith against the two Sachs, and the two Hellers. Neither Isam White, nor Levy White, is joined as plaintiff or defendant. He alleges special several damages resulting to him, alone, from the breach. It is claimed by the defendants, that this action cannot be maintained if the parties, L. and I. White, are not joined. The only terms of the contract indicating its character, whether joint or several, are, "They have agreed to become partners." That is the language of the contract. The contract, therefore, is not, in express terms, either joint or several.

In the case of *Capen* v. *Barrows*, 1 Gray, 376, the court citing Broom on Parties, pp. 8 and 10, these rules are laid down: Where the covenant is, in its terms, *several*, but the *interest* of the covenantees *is joint*, they must join in suing upon the covenant; 2. Where the covenant is, in its terms, *expressly* and *positively joint*, the covenantees must join in an action upon the covenant, although as between themselves, their interest is several; 3. Where the language of the covenant is *capable of being so construed*, it shall be taken to be *joint or several according to* the INTEREST of the covenantees.

The last is the category in which this contract falls. The terms are expressly neither joint nor several; so the parties, according to that rule, may consider it as either joint or several, according to their interest, and the nature of the cause of action. Certainly, each party has an interest in having each and all of the other parties go on with the partnership and carry out the agreement. Each has a several interest in carrying out that partnership arrangement. He cannot sue them all, at law, because some of them have committed no breach. There is no cause of action against them. He cannot join them all as plaintiffs, because all are not injured, or have not all sustained the same injury.

The injury complained of is not joint. It affects no one but the plaintiff. If a recovery is had for the damages alleged, the partnership assets are neither increased nor diminished. The plaintiff does not contribute to pay his own judgment, nor do any of the others share in the judgment. He could not join as party plaintiff those who are guilty of the breach, and liable for the damages, because the damages are several and his own, and not theirs. The parties sued cannot be both plaintiffs and defendants; and unless he can sue those, alone, who committed the breach and are liable, there is no remedy whatever. There would be a wrong—an injury—without a remedy. His several interest is injured by the action, alone, of those sued for which he alleges special damages. He must be entitled to recover against somebody, and it must be against those who are guilty of the breach, or nobody. Nobody else can share in that recovery, or be compelled to contribute to the payment of the judgment, if he does recover damages. Although not so in express terms, I do not perceive why the contract might not be regarded as a contract both joint, and several, a contract by each party with all the others to enter into a partnership with all the others; also, a contract between each one, with each or more of the others, that he will go into partnership with all the others. That would seem to be the effect. The interests of the parties seem to require it to be so regarded.

It is a contract *sui generis*. None of the cases cited are

exactly in point, but that seems to be the rule as stated in Gray, and in Broom on Parties, pp. 8, 10. In the case in Gray, the language is precisely in effect the same as in this case: "Have agreed to become partners," in one, and "parties agreed to form a partnership" in the other. The interest is held to be joint in that particular action. The rule of the cases appears to be this: where the interest in the cause of action is several, the parties should sue separately, if the covenant is not "expressly and positively" in terms joint.

In Sanders, page 154, in a note to *Eccleston* v. *Clipsham*, cited by the defendant, it is said: "So, though a man covenant with *two or more jointly*, yet, if the *interest and cause of action* of the covenantees be *several* and not joint, the covenant shall be taken to be *several*, and each of the covenantees may bring an action for *his particular damage*, notwithstanding the words of the covenant are *joint*."

The case coming nearest to this, that I have seen, is *Vance et al.* v. *Blair*, 18 Ohio, 532. The parties entered into an agreement with reference to a particular transaction, which would make them partners in that transaction. Two of them finally sold out to a third, before commencing operations; and the third violated the agreement, and the two remaining parties sued that third party for the violation of the agreement. On demurrer for want of parties, the court says: "Another objection is, that Cary and Hyatt are not parties to the action. Cary and Hyatt, although parties to the contract, we think could not be parties to this suit. Before the work commenced, as can be fairly inferred from the declaration, they sold out, each his one sixteenth of the right to the contract, to Blair. They have no cause of complaint against either party; nor can either party complain of them. They have not broken the contract, nor has either of the parties broken it with them. They cannot maintain a suit against Blair, because Blair admitted to them their rights under the contract, and paid them what they were willing to take for those rights. The plaintiffs cannot maintain a suit against them, because they duly claimed and received what they had a right to, under the contract—the same that the plaintiffs were claiming in this

suit." And, therefore, the court overruled the demurrer upon that ground, but sustained it upon another technical ground, having no relation to this question. Levy and Isam White were willing to go on, and are not liable. Why should the plaintiff sue them? They have no interest in his recovery; why should they join? The only parties to the breach and the damages alleged, are the plaintiff and the defendants. If plaintiff cannot sue in that way, he cannot sue at all. He has no right of action in equity, because the partnership was never launched. The agreement is, to enter into partnership at a future day, which the defendants refuse to do. Certainly, the defendants cannot be both plaintiffs and defendants in an action at law. I think that point not tenable.

The next point is, that the defendants cannot be joined. It is alleged that they jointly conspired together to commit the breach; that they jointly conspired, and jointly acted. Then they are jointly liable. I do not see why they cannot be joined. It may be true, that if one of them had refused to carry out the contract alone, the other defendants would be entitled, on that ground, to refuse to go on with the others without him. But that is not set up. That is not the case made by the complaint. It may be a proper matter for answer. It is contended that plaintiff cannot recover, *because* if any one of the parties to the contract refused to carry it out, the rest would be entitled to repudiate the contract until he consents, because they only agreed to go into partnership with the others alone. That is not the aspect presented in this case. It is not alleged here, that one refuses to go on, and that the co-defendants refuse to go on *because* of that refusal. The allegation is, that the defendants "jointly conspired together, and jointly committed the breach complained of." That is the allegation. I think that ground is not tenable.

The further point is made, that the contract is void for uncertainty. "The business of the partnership shall be buying, selling, and dealing in dry goods and furnishing goods, and such other wares and merchandise as may be convenient and profitable to all parties concerned." Cer-

tainly, the dry goods business and furnishing goods business, must be sufficiently well known to merchants to make it reasonably certain what the subject-matter is. Then, as to "such other wares and merchandise as may be convenient and profitable." I see no objection to it, if the parties so choose to stipulate. It is an agreement. First, they shall deal in dry goods and the general furnishing goods business. Those terms have a well-known meaning among mercantile men. Then the further agreement is, in effect, that they shall deal in such other wares and merchandise as they may agree upon, to be convenient and profitable. If they choose to put it in that form, I do not see that they have not the right to do so. They have, substantially, provided a mode and means of making it specific, by leaving it for their future decision, as the occasion may call for when it arises. I think the demurrer, therefore, is not tenable on that point.

The next point is, that either party could dissolve the contract, consequently, no action lies. They have specified the term of five years from the first of January following, for the term of the partnership; and it is provided, that in case any one should go out of the firm, there shall be no allowance for the good-will. After executing the contract, these parties allege that they made certain other arrangements, which defendants knew, at the time of making the contract, the plaintiff must make in order to go into that partnership; by which arrangement plaintiff necessarily lost money. And then, after having sustained these losses, after taking upon himself these inconveniences, with the knowledge of defendants, these defendants refused to carry out the arrangements for the partnership, whereby the plaintiff sustained damages. It seems to me there is a cause of action stated here. What the rule of damage may be, would be another question. What the amount of it, another question. They have agreed to enter into a partnership for the purpose of carrying on the prescribed business, which the defendants have violated. Certainly, there must be some grounds for damage at all events, even if nothing more than nominal.

The other point is, that no such damages as alleged can be recovered. I have passed upon that point, so far as the

claim is concerned, when I refused to strike out. I think there is a basis for damages of some sort alleged; certainly, for nominal damages.

Demurrer overruled, with leave to answer on the usual terms.

Isam White against the same parties, is an action brought by another one of the parties to the contract against the same parties, for the several individual damage sustained by him.

Of course the same principle applies to that.

Levy White against the same defendants, is the third case of the same kind, and the

Demurrer in each will be overruled on the usual terms.

UNITED STATES *v.* J. W. STEPHENS.

CIRCUIT COURT, DISTRICT OF OREGON.
MAY 15, 1882.

1. SPIRITS AND WINE—INTRODUCTION OF, INTO ALASKA.—By the act of March 3, 1873 (17 Stat. 530), the introduction of spirituous liquors and wine into Alaska is absolutely prohibited, subject to the power of the war department to permit such introduction for the use of the army therein; and, *semble*, that section 2 of the Alaska act of June 27, 1868 (15 Stat. 240; sec. 1954 R. S.), which gave the president "power to restrict and regulate or to prohibit the importation and use of * * * distilled spirits" into Alaska, is still so far in force, notwithstanding the passage of said act of March 3, 1873, as to authorize him to permit the introduction of said spirits, but not wine, as a regulation of the subject.
2. ATTEMPT TO INTRODUCE SPIRITUOUS LIQUORS INTO ALASKA.—By section 20 of the act of June 30, 1834 (4 Stat. 729), extended over Alaska by the act of March 3, 1873, *supra*, it was made a crime to attempt to introduce spirituous liquors or wine into Alaska: *Held*, that a person resident in Alaska, who ordered one hundred gallons of whiskey to be shipped to him at Alaska, by a wholesale dealer in San Francisco who had the whiskey on hand and for sale, with intent to introduce the same into Alaska, was not guilty of such attempt, because he had done no act to accomplish his illegal intent of which the law will take cognizance—the offer to purchase the liquor, and even the purchase itself, being acts preparatory and indifferent in their character.

3. SAME.—*Semble*, that a criminal attempt to introduce liquor into Alaska cannot be committed unless the act done in pursuance of the illegal intent is performed after the liquor is brought so near some point or place of "the mainland, islands, or waters" of the district as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned.

Before DEADY, District Judge.

Rufus Mallory, for the plaintiff.

Cyrus Dolph, for the defendant.

DEADY, J. On March 30, 1882, an information was filed by the district attorney, accusing the defendant, by the first count, of the crime of introducing spirituous liquors into the district of Alaska, contrary to law; and, by the second count, of the crime of "attempting" to so introduce such liquors into said district. The defendant demurs to the information because it does not state facts sufficient to constitute a crime.

Upon the argument of the demurrer it was abandoned as to the first count, and insisted upon as to the second. This count alleges that on July 14, 1879, the defendant, being in the district of Alaska, wrote and transmitted a letter to a certain firm in San Francisco, California, wherein and whereby he requested said firm to ship and send to him at Fort Wrangel, in said district, one hundred gallons of whiskey; the defendant then well knowing that said firm were then wholesale dealers in spirituous liquors and owned and possessed said one hundred gallons of whiskey; "and he thereby contriving and intending to introduce the said one hundred gallons of whiskey into the said district of Alaska."

In *United States* v. *Savaloff* (2 Saw. 311), the district court for this district, having decided that the district of Alaska was not "Indian country," and that the act of June 30, 1834 (4 Stat. 729), regulating the trade and intercourse with the Indian tribes, was not in force therein, congress, in the general appropriation act of March 3, 1873 (17 Stat. 530), amended section 1 of the Alaska act of June 27, 1868 (15 Stat. 240; sec. 1954 R. S.), so as to extend over that

country, sections 20 and 21 of said act of June 30, 1834, as well as the acts relating "to customs, commerce, and navigation."

The first of these sections provides, among other things, that "if any person shall introduce or attempt to introduce any spirituous liquors or wine into the Indian country," except supplies for the army under the direction of the war department, he "shall forfeit and pay a sum not exceeding three hundred dollars."

By the act of March 3, 1847 (9 Stat. 203), said section 20 was amended so that upon a conviction before the proper district court of such act or attempt, the party should be punished by imprisonment not exceeding one year. The section was again amended by the acts of February 13, 1862 (12 Stat. 339), and March 15, 1864 (13 Stat. 29; sec. 2139 R. S.) By these latter amendments the maximum punishment for a violation of the section was fixed at two years' imprisonment and three hundred dollars fine; and jurisdiction was given to the circuit as well as the district court.

By section 2 of the Alaska act, *supra* (sec. 1955 R. S.), the president was given "power to restrict and regulate or to prohibit the importation and use of firearms, ammunition, and *distilled spirits* into and within the territory of Alaska."

It is a question whether this provision, so far as distilled spirits are concerned, was not superseded and repealed by the extension of said section 20 over Alaska by the act of March 3, 1873, *supra*. This section, as has been stated, absolutely prohibits the introduction of spirituous liquors, which of course includes distilled spirits, into Alaska, except for the use of the army by permission of the war department. Without doubt, as to the executive power to restrict or prohibit, the later act supersedes the earlier one. A statute power in the president to restrict or prohibit, is certainly rendered nugatory by a subsequent act which absolutely prohibits. But as to the power "to regulate," which naturally implies the power to permit, the case is not so clear. Probably the better conclusion is that the acts should be construed as *in pari materia*, and both have effect so far as possible.

Upon this construction of the statutes, the law conerning the introduction of spirituous liquors and wine into Alaska is, that such introduction is absolutely prohibited, subject to the power of the war department to permit the same for the use of the army, and the power of the president to permit the introduction of distilled spirits, but not wine, for any purpose.

It is doubtful if any attempt to commit an offence of this character is indictable at common law, and this is probably the reason why it was made so specially by the act defining the crime. (1 Whart. C. L., sec. 177; 1 Bish. C. L., secs. 684, 687.)

It is said that the subject of attempt to commit crime is "less understood by the courts," and "more obscure in the text-books," than any other branch of the criminal law. (Bish. C. L., sec. 657.) And certainly there is none, in some respects, more intricate and difficult of comprehension. It is almost impossible to comprehend all cases of attempt in a definition that does not necessarily run into a mere enumeration of instances. It is easy to say that there must be a combination of intent and act—an intent to commit a crime, and an act done in pursuance of such intent, which falls short of the thing intended.

There are a class of acts which may be fairly said to be done in pursuance of or in combination with an intent to commit a crime, but are not, in a legal sense, a part of it, and therefore do not with such intent constitute an indictable attempt. For instance, the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are considered in the nature of preliminary preparations—conditions, not causes—and although coexistent with a guilty intent, are indifferent in their character, and do not advance the conduct of the party beyond the sphere of mere intent. They are, it is true, the necessary conditions without which the shooting or poisoning could not take place, but they are not, in the eye of the law, the cause of either. (1 Whart. C. L., secs. 178, 181; 1 Bish. C. L., sec. 668 *et seq.*; *The People* v. *Murray*, 14 Cal. 160.)

Dr. Wharton says (*supra*, sec. 181): "To make the act an indictable attempt, it must be a *cause* as distinguished from a *condition*. And it must go so far that it would result in the crime unless frustrated by extraneous circumstances." Bishop says (*supra*, sec. 669): "It is plain that, if a man who has a wicked purpose in his heart, does something entirely foreign in its nature from that purpose, he does not commit a criminal attempt to do the thing proposed. On the other hand, if he does what is exactly adapted to accomplish the evil meant, yet proceeds not far enough in the doing for the cognizance of the law, he still escapes punishment. Again, if he does a thing not completely, as the result discloses, adapted to accomplish the wrong, he may under some circumstances be punishable, while under other circumstances he may escape. And the difficulty is not a small one, to lay down rules readily applied, which shall guide the practitioner in respect to the circumstances in which the criminal attempt is sufficient."

In *The People* v. *Murray*, *supra*, the defendant was indicted for an attempt to contract an incestuous marriage, and was found guilty. From the evidence it appeared that he intended to contract such marriage, that he eloped with his niece for that purpose, and requested a third person to get a magistrate to perform the ceremony. Upon an appeal the judgment was reversed. Chief Justice Field, delivering the opinion of the court, said: "It (the evidence) shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offence charged. Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made * * *; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular of-

fence, but for the intervention of circumstances independent of the will of the party."

In the case under consideration, to constitute the attempt charged in the information there must have been an intent to commit the crime of introducing spirituous liquors into Alaska, combined with an act done in pursuance of such intention that apparently, in the usual course of events, would have resulted in such introduction, unless interrupted by extraneous circumstances, but which actually fell short of such result.

But it does not appear that anything was done by the defendant towards the commission of the intended crime of introducing spirituous liquors into Alaska, but to offer or attempt to purchase the same in San Francisco. The written order sent there by the defendant was, in effect, nothing more or less than an offer by him to purchase the one hundred gallons of whiskey; and it will simplify the case, to regard him as being present at the house of the San Francisco firm, at the time his order reached them, seeking to purchase the liquor with the intent of committing the crime of introducing the same into Alaska.

But the case made by the information stops here. It does not show that he bought any liquor. Whether he changed his mind, and countermanded the order before the delivery of the goods, or whether the firm refused to deal with him, does not appear.

Now, an offer to purchase whiskey, with the intent to ship it to Alaska, is, in any view of the matter, a mere act of preparation, of which the law takes no cognizance. As the matter then stood, it was impossible for the defendant to attempt to introduce this liquor into Alaska, because he did not own or control it. It was simply an attempt to purchase—an act harmless and indifferent in itself, whatever the purpose with which it was done.

But suppose the defendant had gone further, and actually succeeded in purchasing the liquor, wherein would the case differ from that of the person who bought the gun or poison with intent to commit murder, but did no subsequent act in

execution of such purpose? In all essentials they are the same.

A purchase of spirituous liquor at San Francisco or Portland, either in person or by written order or application, with intent to commit a crime with the same—as to dispose of it at retail without a license, or to a minor, or to introduce it into Alaska—is merely a preparatory act, indifferent in its character, of which the law, lacking the omniscience of Deity, cannot take cognizance.

At what period of the transaction the shipper of liquor to Alaska is guilty of an attempt to introduce the same there, is not very easily determined. Certainly the liquor must first be purchased—obtained in some way—and started for its illegal destination. But it is doubtful whether the attempt, or the act necessary to constitute it, can be committed, until the liquor is taken so near to some point or place of "the mainland, islands, or waters" of Alaska as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned. But this is a mere suggestion; and each case must be determined upon its own circumstances.

The demurrer is sustained to the second count, and overruled as to the first.

UNITED STATES v. WILLIAM S. THOMSON.

CIRCUIT COURT, DISTRICT OF OREGON.
MAY 23, 1882.

1. TAKING PASSENGERS ON BOARD.—Passengers who go on board a vessel openly and in the usual way are presumed to have been taken on board by the master within the purview of sections 4252–4253 of the revised statutes.
2. INTENT TO COMMIT CRIME.—Neglect in the discharge of a duty or indifference to consequences is in many cases equivalent to a specific criminal intent.
3. CASE IN JUDGMENT.—The defendant being the master of a vessel under charter at the port of Hongkong to carry passengers to Portland, Oregon, permitted the charterers to load her under the inspection of the port offi-

cers without himself knowing or taking any steps to know how many passengers were on board; and upon arrival in Oregon it was found that there were one hundred and sixty passengers in excess of the number allowed to be carried by sections 4252–4253 of the revised statutes. *Held*, that it was the duty of the defendant to have taken steps before leaving the port to ascertain how many passengers he had on board, and that the omission of this duty was such negligence on his part as made him guilty of a violation of the statute.

Before DEADY, District Judge.

INFORMATION for the violation of section 4253 of the revised statutes, tried by the court without the intervention of a jury.

J. F. Watson, for the plaintiff.

John W. Whalley, for the defendant.

DEADY, J. Section 4253 of the revised statutes provides, that if "the master" of any vessel at a foreign port not contiguous to the territory of the United States, "shall take on board such vessel" "any greater number of passengers" in proportion to the space allowed them therein, than is prescribed by section 4252 of the revised statutes, "with intent to bring such passengers to the United States," and does bring the same within the jurisdiction of the United States, he shall be deemed guilty of a misdemeanor," and fined fifty dollars for every such passenger, and may also be imprisoned not exceeding six months.

The defendant, as the master of the English steamship *Bothwell Castle*, is accused by the information herein of violating this statute, by taking on board said vessel on April 21, 1882, at the port of Hongkong, one hundred and sixty passengers more than the number allowed thereby to be carried thereon, with intent to bring the same to the United States, and by afterwards bringing said passengers on said vessel within the jurisdiction of the United States, to wit, the district of Oregon. The defendant pleaded not guilty to the charge, and by the stipulation of the parties the case was tried by the court without a jury.

From the evidence, including the testimony of the master,

his chief officer, and two of the seamen, it appears that within a year past the defendant carried a cargo of Chinese passengers on this vessel from Hongkong to San Francisco, consisting of one thousand and thirty-three adults; that on April 18, 1882, the "administrator" of the port of Hongkong licensed the *Bothwell Castle* to carry, under the English passenger act, not exceeding one thousand and ninety-four Chinese passengers from that port to Portland, Oregon; that on April 20th the "emigration officer" of the same port gave the vessel a "certificate," to the effect that she had space and was furnished to carry one thousand and ninety-four adult passengers on said voyage, and that there was then on board one thousand and thirty-two men and twenty children, equal to one thousand and forty-two adults; that on the same day the "harbor master" gave the vessel a "clearance" for Portland with one thousand and fifty-two Chinese passengers in the lower berths, "under the emigration officer's certificate;" that a passenger list attached to said documents, and signed "George Holmes, passenger broker," and containing the names of one thousand and fifteen ordinary passengers, and thirty-seven doctors, interpreters, stewards, cooks, etc., or in all one thousand and fifty-two passengers, was delivered by the defendant on May 14, 1882, to the collector at Astoria, verified by his oath then made as containing "the names and descriptions of all the passengers who were on board the said steamer *Bothwell Castle* at the time of or since her last departure from the said port of Hongkong;" that said vessel on said voyage was chartered to carry Chinese passengers to Portland, and while lying in the stream at Hongkong, not less than a mile from the shore, on April 20, 1882, took on board one thousand one hundred and ninety-eight of such passengers, of whom about one thousand and forty-one had "contract passage" tickets, containing the terms of the contract, a receipt for fifty dollars in payment of the passage, with the name of the passenger, his sex, age, occupation, and place of birth, signed by "George Holmes, passage broker," and signed and certified by the "emigration officer," to the effect that he had "explained and registered" the same, and

about one hundred and fifty-seven had similar tickets not signed by any one, and brought the same to this port when by law she was not entitled to carry more than one thousand and thirty-eight such passengers, being an excess of one hundred and sixty; that after all said passengers were on board said vessel there was a count of the same made by the "harbor master" and "assistant health officer" of the port on said April 20th, and the defendant upon a statement then given him by them and by him delivered to the proper local authorities, obtained his clearance and gave bond to convey the passengers as per agreement, and at six o'clock the next morning sailed for Portland; that soon after starting a strict search was made for stowaways or persons who had not paid, and one found and put off the vessel, but no attempt was ever made by the master or any one under his direction or authority to count the passengers or ascertain how many were on board until the vessel was within two or three days of the mouth of the Columbia river, when the defendant ordered the tickets taken up, and found that he had about one hundred and sixty passengers more than he was entitled to carry; that on April 19th the "government marine surveyor" measured the vessel according to the American law as furnished him by the American consul, and furnished the defendant with a written report thereof, from which it appears that she was not entitled to carry more than one thousand and five passengers, but upon a survey made by the collector at Astoria, it was ascertained that she had space enough for one thousand and thirty-eight.

The defendant denied, in his testimony, all knowledge of the excess of passengers, or of his liability therefor under the United States statute, and said that he paid no attention to the matter, and supposed that the port officers would duly attend to it, and not allow him to sail with more passengers than there were on his list; and when the collector at Astoria ascertained that there was an excess of passengers on board, by counting them, and asked the defendant how it came that there were one hundred and sixty too many, the defendant said he did not know; that it was not a matter that he was bound to look after—he went by

the list; that the company had sold three thousand tickets, and he supposed they were short of ships.

There is no conflict in the evidence, and assuming that the facts are substantially as stated, counsel for the defendant insists that he cannot be found guilty, because there is no evidence of a specific criminal intent—that as he did not know he had taken on more passengers than the law allowed, he cannot be held to have taken on the excess with the "intent" to bring them to the United States.

And, first, what constitutes a taking on board, within the meaning of the statute? I suppose that all passengers who go on board openly in the usual way—not clandestinely and without the master's consent, expressed or implied—are taken on board by him. It is not necessary that he should see them come. He may, and usually does, commit that duty to his subordinates. But as no one has a right to come on board without his consent, a passenger found there is presumed to have been taken on board by him, until the contrary appears.

There was a suggestion in the argument, that the excess of one hundred and sixty might have gotten on board surreptitiously, after the count by the port officers, during the afternoon and night of April 20th, by climbing up the ship's sides. But that was impossible, unless with the connivance of the officers and crew. And the proof is, that a strict watch was kept on board during that time, and that only one little boat approached the vessel, and it was sent away.

It must be assumed, then, that all the passengers on the vessel came on with the implied consent of the master. He took no steps to prevent any of them coming on board—gave no directions to his officers to allow only so many passengers to come on board, and, therefore, in contemplation of law, they were taken on by him. But, nevertheless, if there must have been a positive or specific "intent" in the mind of the defendant to take on this one hundred and sixty passengers for the purpose of bringing them to the United States, in the same way that a specific criminal intent is necessary to constitute larceny, then the prosecution

must fail, for whatever the fact may be, no such intent has been shown. But, in many cases, negligence or indifference to duty or consequences is equivalent to a criminal intent. (1 Bish. C. L., sec. 62; 1 Whart. C. L., secs. 89, 125.)

Under the circumstances, the statute forbade the defendant from taking on board any of these one hundred and sixty passengers; and he could not knowingly have done so without intending to violate the statute. What was his duty, then? To leave the matter in the hands of his charterers and their broker, who were only interested in getting as many passengers on board as possible, and the port officers, who were under no obligations to prevent a violation of a United States statute, but only concerned to see that the regulations of the port were complied with? I think not. In my judgment, it was the duty of the master, before leaving the port of Hongkong, to have taken steps to ascertain how many passengers he had on board, if he had not taken an account of them as they came on, as he should have done. This duty should have been performed in person, or by his officers under his direction. The omission of it was an act of gross negligence, in consequence of which these one hundred and sixty passengers were unlawfully brought to the United States, which consequences he must be held to have intended.

Any other construction of the statute would make it a dead letter. Neither ship nor owners are responsible for its violation, as they ought to be, and the master can always be kept in convenient ignorance of the facts until the vessel has sailed from port, and then it is too late for him to commit the crime of taking them on board with a specific intent to bring them to the United States.

There are also some circumstances in the case which tend to show that the defendant was not altogether innocently ignorant in this matter. When off the mouth of the Columbia river he found out that he had a large excess of passengers on board. It would have been natural for an innocent man to have reported that fact to the collector when delivering his list of passengers. Still he might not, and the master says he did not, because he was not interro-

gated about it. But how could an honest, truthful man, not only suppress this fact of the excess, but also declare on oath that the passenger list contained the names of all the passengers on board when he absolutely knew that it did not, by a large number?

But as to a portion of this excess, the evidence is satisfactory that the master knew he had them on board, and therefore must have taken them on with a specific intent to violate the statute.

He says that he knew, or supposed, he had one thousand and fifty-two passengers on board—the number contained in the list furnished by the passenger broker. But the survey of his vessel made by the surveyor of the port, under the American law, on April 19th, a written report of which was furnished the defendant and brought by him to this port, shows that the vessel was entitled to carry only one thousand and five passengers, or forty-eight less than the list. This was the knowledge which the defendant had when he took these forty-eight passengers on board and left with them for this port. The only reasonable inference from the premises is, that he took them on with the intent which constitutes the violation of the act, if followed up by bringing them here. True, the measurement of the vessel by the collector at Astoria shows that she has space for one thousand and thirty-eight passengers. But that is the defendant's good fortune rather than the result of his good conduct. He did not act upon that impression. And still there are fifteen passengers on the list in excess of what the vessel was entitled to carry by the Astoria measurement, of which the defendant must have had knowledge.

The finding of the court is that the defendant is guilty as charged in the information.

UNITED STATES *v.* W. S. THOMSON.

DEADY, J. The defendant is also charged upon the information of the district attorney with the violation of section 4266 of the revised statutes by refusing and neglecting to deliver to the collector at the port of Astoria a list

of all the passengers taken on board the *Bothwell Castle*, at the port of Hongkong, on the voyage in question. The case is submitted to the court upon the plea of "not guilty," and the evidence in the foregoing case, and the further testimony of the defendant upon the point. The court finds the defendant guilty, and he is sentenced to pay a fine of one thousand dollars, as provided by said section.

UNITED STATES *v.* 3,880 BOXES, EACH CONTAINING 5 TAELS OF OPIUM.

DISTRICT COURT, DISTRICT OF CALIFORNIA.
JUNE 2, 1882.

CUSTOM DUTIES—SMUGGLING—CONDEMNATION OF PROPERTY SEIZED.—Where a quantity of opium was seized by officers, the burden of proof is on the claimant to show that the property seized was of domestic manufacture, and not liable for custom duties; and if he fails to explain the difficulties of the case by the production of proofs within his power to produce, "condemnation follows from the defects of testimony on the part of such claimant." And where the claimant has it in his power to produce the best and most satisfactory evidence to repel the presumption which the law has raised against him, and he omits to do so, and contents himself with the weaker evidence, the presumption is "turned against him that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defence."

Before HOFFMAN, District Judge.

A. P. Van Duzer, assistant United States attorney, on behalf of the United States.

George W. Towle, jun., for claimants.

W. H. L. Barnes, of counsel.

HOFFMAN, J. On the night of the third of January, between twelve and one o'clock, as officers Egan and Smith, of the harbor police, were on duty patrolling the bay along the city front, their attention was attracted to a boat, which when first discovered was at a short distance from the stern

of the steamer *City of Tokio*, then recently arrived from China. They at first supposed it to be the custom-house lookout boat, but observing that she had pulled out from the stern of the steamer, their suspicions were aroused, and they gave chase. The boat they were pursuing seemed desirous of escaping, but as she was heavily laden, and was rowed by only one pair of sculls, while their own boat was light and rowed by both officers, she was soon overhauled. When they had approached within a short distance of the boat, the officers hailed her and ordered her to stop. Whether the order was obeyed they are unable to state, as the boat's oars were muffled. On coming alongside the boat, the officers inquired of the men in charge of her what they had on board. The reply was that they did not know. One of the officers then put out his hand and felt one of the packages. He at once recognized by the sound that it was a tin case, and concluded that the package contained opium. The men were then placed under arrest and handcuffed. They were much excited, and repeatedly begged the officers to take the stuff and let them go. The officers refused to listen to their entreaties, and the boat was taken to the Folsom-street wharf in tow of the patrol boat, when the men were landed, and by officer Smith conducted to the nearest police station.

Officer Egan remained in charge of the boat and its contents, and while awaiting officer Smith's return, he observed a man looking around as if trying to discover where the boat was. After the return of officer Smith, and while the opium was being landed on the wharf, both officers approached the man who had been observed on the lookout. He declined to speak with them both, saying, "One at a time, I want to do business with one at a time." Officer Smith then withdrew, and the man, who gave his name as Kennedy, offered Mr. Egan at first two and subsequently ten thousand dollars if he would let the arrested men go, telling him he might "keep the stuff," that he did not want to be exposed, etc. This proposal was rejected by the officer. Substantially the same propositions were made to officers Smith and Metzler, the latter of whom had come from the police station to assist in un-

loading the boat. To each of these officers he claimed to be interested in or to be the owner of the boat and her cargo. He said his name was Kennedy. One of the parties arrested, and who has since been indicted, is named Kennedy, and is the claimant in the present suit. On the crew list of the steamer *City of Tokio* appears the name of Kennedy as steerage steward. There are said to be three brothers of that name. I have omitted to mention that to one of the officers the Kennedy who appeared on the wharf stated that he was regularly engaged in the smuggling business, and that if the officer would discharge the prisoners, he would put him "in the way of making many a dollar." And to another, when proposing that he should keep "the stuff," he offered to show him where he could sell it.

The admission of this testimony was strenuously objected to on behalf of the claimant, unless it should be shown *aliunde* that Kennedy was connected with the goods or with the claimant. I think it clearly admissible as part of the *res gestæ* or circumstances attending the seizure. The inquiry here is not as to the guilt or innocence of persons accused of smuggling, but as to the guilty or innocent character of the goods seized. Any circumstance tending to show that they were illicit or smuggled goods can be proved with a view of impressing on them a guilty character. Nor can any proper narrative of the seizure be given if any material circumstance attending it be omitted.

Some time after midnight on a boisterous and stormy night, a deeply laden boat, with muffled oars, is discovered in the immediate vicinity of a recently-arrived China steamer. When overhauled the men in charge profess ignorance of her lading. She is found to be laden with one hundred packages, each containing forty five-tael boxes of opium, the value of which was in the neighborhood of twenty thousand dollars. On being arrested, the men in charge made repeated offers to surrender this valuable property as the price of their liberation. And a short time after, when the boat has reached the wharf, and before the contents are unladen, a person who had apparently been on the watch, approaches the officers with offers of large bribes,

claims to be the owner of or interested in the goods, and avows himself engaged in the smuggling business. Certainly no one of these circumstances should be withheld from the knowledge or withdrawn from the consideration of any one seriously inquiring into the true character of the goods in question. (*United States* v. *Nine Trunks*, The Reporter, vol. 6, N. S., p. 613). On the morning after the seizure the packages were taken to the United States Appraiser's Building and delivered to the custom-house authorities. They consisted of one hundred and ninety-four tin cases, each containing twenty five-tael boxes of opium. These tin cases and the boxes containing the opium in external appearance exactly resembled the cases and boxes in which opium is imported from China. So close was this resemblance as to brands, stamps, labels, etc., and the size and shape of the packages, that it was impossible to distinguish by any external signs the seized opium from the imported article.

In further proof that the goods under seizure were foreign imported opium, the prosecution called a Chinese witness who professed to be an expert, and testified that he had been employed at Hongkong in the manufacture of opium. A sample of the opium seized was presented to him. After testing it in the presence of the court by burning and smoking, he pronounced it to be of Hongkong manufacture.

It was also shown on the part of the United States, that by the regulations of the custom-house a duty-paid stamp is attached to all packages of foreign opium which have been regularly imported and entered. No such stamps were found on the packages under seizure. It is unnecessary to dwell on this circumstance, for it is not pretended that duties have been paid on the goods on trial. The defence, when subsequently developed, was based on the contention that they were of domestic manufacture and not subject to duty. On these proofs the court was of opinion that not only had a clear case of probable cause of seizure been made out by the government, but that a very strong *prima facie* case for condemnation had been shown, and that the *onus probandi* was on the claimant.

Before proceeding to examine the proofs offered by the claimant, what constitutes probable cause, and what is the nature of the "burden of proof" which the law casts upon him, must first be considered.

Section 909 of the revised statutes of the United States is as follows: "In suits or informations brought, when any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall be upon such claimant; *provided*, that *probable cause* is shown for such prosecution, to be judged of by the court." This provision, which was originally adopted in 1799, has been frequently applied and expounded by the courts. In *Locke* v. *United States*, 7 Cranch, 339, Marshall, C. J., observes: "It is contended that probable cause means *prima facie* evidence, or in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. This argument is very satisfactorily answered, on the part of the United States, by the observation, that this would render the provision totally inoperative. It may be added, that the term probable cause, according to its usual acceptation, means less than evidence which would justify condemation; and, in all cases of seizure, has a fixed and well-known meaning. It implies a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

In the *Case of John Griffin*, 15 Wall. 33, the supreme court says: "The case as thus made amounts to something more than the probable cause which by section 71 of the Act of 1799 throws the *onus probandi* on the claimant of the vessel. It is a clear *prima facie* case, and both by the statute and the ordinary rules of evidence required of the claimant such testimony as should *satisfactorily rebut* the presumption of guilt which it raised."

These observations apply with equal force to the case at bar. There can, I think, be no doubt that a *prima facie* case for condemnation was made by the government, and that the *onus probandi* was thrown upon the claimant, and it became

his duty "to satisfactorily rebut the presumption of guilt which it raised." This duty could only be discharged by the production of the best evidence of which the nature of the case admitted. In the *Case of the Luminary*, 8 Wheat. 407, the supreme court says: "When the *onus probandi* is thrown on the claimant in an instance or revenue cause by a *prima facie* case made out on the part of the prosecution, and the claimant fails to *explain the difficulties of the case* by the production of papers and other evidence which must be in his possession or under his control, *condemnation follows from the defects of testimony on the part of the claimant.*"

It will be noted that in the case at bar, there were not merely "difficulties" to be "explained," but positive testimony that the goods were of Hongkong manufacture, and that they had not passed through the custom-house. If so, they must necessarily have been smuggled—a conclusion strongly corroborated by all the circumstances attending the seizure. In the case of *Clifton* v. *United States*, 4 How. 247, the supreme court says: "Under these circumstances the claimant was called upon by the strongest consideration, personal and legal, if innocent, to bring to the support of his defense the very best evidence that was in his possession or under his control. This evidence was certainly within his reach, and probably in his counting-room, namely, the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it and contented himself with weaker evidence, but even refused to furnish it on the call of the government, leaving, therefore, the obvious presumption to be turned against him, that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defense. One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable and is frequently applied to the distinction between the higher and inferior de-

grees of proof, speaking in the more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is not that the courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted which from the nature of the case supposes still greater evidence behind in the parties' possession or power; because the absence of the primary evidence raises a presumption that if produced it would give a complexion to the case at least unfavorable, if not directly adverse to the interest of the party. * * * For a like reason even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher; and the inferior is therefore admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence, especially when it appears or has been shown to be in his possession or power, and must and should in all cases exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled. It is well observed by Mr. Evans (2 Evans' Pothier, 149), in substance, that if the weaker and less satisfactory evidence is given and relied on, in support of a fact, when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed if the more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

Guided by the principles thus clearly enunciated by the supreme court, I proceed to consider as briefly as may be, the evidence offered by the claimant to repel the vehement presumption of guilt raised by the case made by the prosecution.

The first evidence on the part of the defence was the

testimony tending to show that the opium in question was not and could not have been taken from the *Tokio*.

It seems that, on some grounds not explained, the custom-house authorities had been led to suspect that an attempt to smuggle opium from the *Tokio* was in contemplation. The force of night watchmen was therefore increased, and the necessity of vigilance strongly impressed upon at least some of them. All the watchmen on duty on the night in question, including both watches—those on duty up to and after twelve, midnight, were examined. They denied having seen any goods taken from the ship. It may be conceded that so large a quantity of opium, exceeding in weight a ton, could not have been discharged from the steamer into a boat alongside without the complicity of the watchmen on board the vessel, or gross and almost inconceivable negligence on their part. These witnesses, therefore, appear on the stand to exonerate themselves, by their own testimony, from the imputations which the theory of the case advanced by the government casts upon them. They are not disinterested witnesses. I speak now of the watchmen on the deck of the steamer. The discharge of the opium, if it in fact occurred, might easily have escaped the notice of the watchmen posted on the wharf. In estimating the credibility of those who must have witnessed the transaction, if it took place, the circumstances under which they appear upon the stand are not to be lost sight of.

Both of the harbor police officers testify, that when they had approached within a short distance of the *Tokio*, they were hailed from the steamer. To the inquiry what boat that was, they replied: "Police boat." I see no reason whatever for discrediting their statement. They have proved their fidelity under circumstances, which, to officers less honest, might have presented an irresistible temptation. It is a fact worthy of notice, that all the night watch deny having heard these hails.

In rebuttal of the Chinese expert testimony offered by the government, the claimant produced other Chinese experts to show that the opium seized was manufactured in

this city. With a view of testing their skill, or veracity, the government produced from the bonded warehouse several boxes of opium proved to have been recently imported from China. These, with other similar samples of the opium under seizure, were carefully wrapped up and submitted to the experts under circumstances which seemed to preclude the possibility of their knowing from which of the two lots of opium the particular sample submitted to them was taken. They proceeded to test them by burning, inhaling, etc., in most instances subjecting the sample to several tests. In almost every instance they pronounced the seized opium to be San Francisco opium, and the custom-house to be Hongkong opium. These experiments must, I think, in fairness be taken as establishing the fact that the witnesses were able to distinguish the seized from the custom-house opium, by the tests they applied. But this is all they establish. The further and vital fact that the seized opium was of San Francisco manufacture, rests upon their declarations of their opinion. No proof was offered to show that only one kind or quality of opium is manufactured at Hongkong. I presume I am at liberty to notice the generally accepted commercial fact, that opium prepared for smoking is largely manufactured in China both from the India opium and from the native article.

The defence relied on, as has been already stated, was that the opium seized was manufactured in this city from imported crude opium. The suspicious circumstances attending the seizure are explained by the suggestion that the object of the midnight expedition of the boat with muffled oars, etc., was to clandestinely place the opium on board the steamer *City of Sydney*, then bound to Honolulu, with a view of smuggling it into that port, where, being a prohibited article, it commands a high price. If such be indeed the facts of the case, they afford, whatever may be thought of the morality of the enterprise, a valid defence to this prosecution, for no offence against the laws of the United States has been committed.

But the court, when such a defence is set up, has a right to exact that it should be satisfactorily made out by the

production of the best proofs that the nature of the case will admit. The fraud relied on as a defence was not only a fraud upon the laws of a friendly foreign power, but a fraud upon the American owners of the *City of Sydney*, who were to be not merely cheated of their freight, but exposed to confiscation or severe penalties, if the proposed smuggling adventure should be detected by the Hawaiian authorities.

In support of this defence, a witness was called who testified that he was a water-tender on board the *City of Sydney*, and that he was employed to secure and secrete on board of this steamer a boatload of opium on the night of the seizure. His story was not unaccompanied by improbabilities, but as he stated that the engagement was made with him alone, and that he alone was on the watch to receive the opium, the statement could not readily be disproved. It received no corroboration from the claimant, who forebore to offer himself as a witness.

But assuming it to be true, it bears but remotely and indirectly upon the vital issue in the case. It may be true that the claimant proposed to smuggle this opium into Honolulu, and it may also be true that he had previously smuggled it into this port.

In further support of the defence set up, a drayman named Sheridan testified with great minuteness of detail to having hauled by order of the claimant on the evening of the seizure, two drayloads of goods to a wharf on the city front, where they were transferred to a boat in waiting to receive them. These goods, the drayman stated, he received at a store in the Chinese quarter from a Chinaman whom he pointed out in court. The testimony of this witness was wholly uncorroborated, notwithstanding that corroboration was easy if the story was true. Neither of the boatmen, nor the Chinaman from whom the opium was said to have been obtained, was called to the stand.

To rebut this testimony the United States produced three witnesses, who testified that Sheridan spent the whole of the evening in question in their company at the Théâtre Comique, a free-concert saloon in this city.

The credibility of these witnesses was vehemently assailed by the counsel for the claimant. No formal attempt to impeach them, however, was made. From their cross-examination it appeared that they were young men of respectable family, but probably somewhat addicted, as unfortunately is too common in this city, to idleness, and perhaps dissipation. I see no reason for absolutely discarding their testimony. It must be accepted as at least casting a doubt upon the truth of Sheridan's statement, and as seriously impairing the strength of the case, which the claimant was bound to make out by satisfactory proofs. A driver in the employ of Sheridan was also called by the prosecution. He testified that on the night in question he slept in the stable where Sheridan's horses and dray were kept, and that they were not taken out of the stable during the night. Upon this witness I place little reliance. He was unable to identify the night in question except by the fact that it was his habit to sleep in the stable. But it was shown by other testimony that his habits were very irregular, and he disclosed unmistakable signs of personal hostility to Sheridan.

The last and most perplexing circumstance connected with this case remains to be considered. The opium seized was packed in tin cases, each containing twenty five-tael boxes. In every one of the cases that was opened was found a fragment of a newspaper published in this city of a date so recent as to preclude the possibility of its having been sent to Hongkong and there inserted in the cases when they were packed. These pieces of newspaper must therefore have been introduced into the cases after their arrival at this port, and as the lids or covers of the cases were found closely soldered, the operation would have required much time and very extensive complicity or extraordinary negligence on the part of the officers in charge of the vessel. But, on the supposition that the opium was in fact manufactured in this city and packed here, with what object could these papers have been inserted in the cases? The suggestion was thrown out at the trial that it might have been to apprise the accomplices at Honolulu of the true

character of the opium. But this could more easily have been done by letter or communicated orally by the claimant, who, it is said, was to accompany the goods to Honolulu. A more probable motive would seem to be, to furnish the apparent evidence of the domestic manufacture of the goods, which is now relied on in this case. If then the opium was of domestic manufacture, and the papers were inserted to furnish evidence of that fact in case of seizure, why was not the simpler and more effectual method resorted to, of procuring from the custom-house authorities stamps which, by the regulations, may on the application of the manufacturer be attached to all packages of manufactured opium? But these stamps would, it is to be presumed, have been furnished only after an investigation and the verification of the true character of the goods, by ascertaining when and by whom they were manufactured, where the crude opium was obtained, and when and by what vessel imported. It may not unreasonably be suspected that the parties were not prepared to invite such an investigation, especially as in the trial of this case they have studiously withheld all information on these points, which, if established in their favôr, would have furnished a complete and unanswerable defense to the prosecution.

The foregoing presents, it is believed, a sufficiently complete statement of the proofs offered on the part of the claimant. It is evident that the case presents but a single issue of fact, viz.: Was the opium manufactured in this city or imported? The claimant contends that a quantity of opium weighing more than a ton, and of the value of nearly twenty thousand dollars, was manufactured in this city, purchased by him, and placed in a boat to be clandestinely laden on board the *City of Sydney*. The *onus probandi* was on him to establish these facts, and by the production of the best evidence the nature of the case admitted. He was himself a competent witness. He is not produced on the stand. The person from whom his drayman states he obtained the opium, though present in court, is not called as a witness. If so large a transaction, in fact, occurred, he could no doubt have corroborated the statements with re-

gard to it by the production of his books and an account of the mode in which he was paid. He could have indicated the name of the manufacturer, and the latter could have shown the place of the manufacture, how and from whom he obtained the crude opium, and, possibly, when and by what vessel it was imported. If the facts be as contended by the claimant, the more searching the inquiry, the more clearly would the truth have been made manifest. Evidence on these points, though within his reach, he has withheld. He has not even called the boatman to corroborate his drayman, though the latter was contradicted by three witnesses.

It was suggested at the bar that the claimant might be unwilling to appear on the stand, where on cross-examination he might be compelled to make compromising disclosures with regard to his operations in the Sandwich Islands, and his confederates in that kingdom. But he and one of his employees, are under indictment for a crime for which, if convicted, they may be sent to the state prison. A large amount of property is staked upon the result of the cause now on trial. If the facts be as he claims, his testimony in support of them would go far to secure the restoration of the goods, and his exoneration from the charge for which he is indicted, while his silence has, under the decisions, a most damaging, if not fatal, effect upon his cause. It would seem that the inducements to him to testify, if the facts be as the defence claims, are far stronger than any motives for silence afforded by the fear of compromising his associates at Honolulu, or of breaking up his illicit but lucrative operations at that port. My conclusion is, that no plainer or stronger case could be presented for the application of the rules of decision laid down by the supreme court in the cases which have been cited, viz.: "That where the burden of proof is thrown upon the claimant, and he fails to explain the difficulties of the case by the production of proofs within his power to produce, condemnation follows from the defects of testimony on the part of the claimant," and further, that where the claimant has it in his power to produce the best and most satisfactory

evidence to repel the presumption which the law has raised against him, and he omits to do so, and contents himself with the weaker evidence, the presumption "is turned against him, that the highest and best evidence going to the reality and truth of the transaction, would not be favorable to the defense." I do not deem it necessary to examine the proofs of other illicit operations in Hongkong by the claimant which seem to be afforded by his intercepted correspondence. I place the decision of the case on the grounds above indicated.

A decree of condemnation must be entered.

UNITED STATES v. WILLIAM AND ELIZABETH TICHENOR.

CIRCUIT COURT, DISTRICT OF OREGON.
JUNE 5, 1882.

1. RESERVATION OF PUBLIC LANDS IN OREGON.—By the passage of the donation act of September 27, 1850 (9 Stat. 497), and the amendment thereto of February 14, 1853 (10 Stat. 158), congress disposed of all the public lands in Oregon to persons who were or should become settlers thereon and otherwise comply with the provisions of such act, except, among others, such portions thereof as might be designated by the authority of the president for certain military purposes and "other needful public uses," not exceeding six hundred and forty acres at any one point or place for a fort, nor more than twenty acres for any other purpose. *Held*, 1. That while an order issued by the secretary of war designating a reservation under this act for a military post or station may be presumed to have been made by the authority of the president, until the contrary appears, no such presumption arises in case such order is made by any one else, and therefore an order issued by the military officer in command of the department directing the establishment of "a military reservation" at Port Orford, Oregon, is void and of no effect; 2. That a valid designation of a reservation for military or light-house purposes must indicate or describe with reasonable certainty in some public document or record the quantity, limits, and location of such reservation; and the same ought to be noted, as soon as practicable, on the plat of the survey of the township; and 3. That such a reservation, if designated, so as to substantially exceed the quantity allowed by law, is illegal and void.
2. PATENT ISSUED CONTRARY TO LAW.—When it appears on the face of a patent that it was issued contrary to law, it is void, and a court of law

will so pronounce; but nevertheless the United States is entitled to maintain a suit in equity to have such void patent cancelled.

3. POSSESSORY RIGHT OF MARRIED SETTLER.—A married settler under the donation act, prior to completion of his residence and cultivation, may abandon or dispose of his possessory right or location without the consent of his wife.
4. LANDS—PURCHASE OF, FOR THE UNITED STATES.—A conveyance of lands to the United States is void and inoperative unless the purchase is authorized by congress. Section 3736 of the revised statutes.
5. FORT—MEANING OF THE TERM.—The term "fort," as used in the donation act, implies a place of more permanence and strength than a mere frontier camp, post, or station.
6. PORT ORFORD.—Congress never authorized or provided for the erection or maintenance of a "fort" at Port Orford.
7. PROMISE MADE UNDER ILLEGAL ARREST.—The arrest and eviction of the defendant, William Tichenor, in 1864, from his donation claim, at Port Orford, or that portion of it said to have been a "military reservation," and his subsequent imprisonment by military force and without process of law, were illegal acts, and any promise extorted from him as a condition of his liberation, concerning his future claim to the premises, was and is void and of no effect; neither would a verbal promise of non-claim, however induced or made, be sufficient to affect his right to or interest in the premises.
8. ALLEGATION OF FRAUD.—It is not sufficient to allege in a bill to set aside the patent to a "settler" that it was "fraudulently" obtained, by means of "false proof," but the acts constituting the fraud should be substantially stated.
9. RESIDENCE AND CULTIVATION OF A "SETTLER."—A settler under the donation act is not required to reside "all over" his claim, nor to cultivate the whole of it, and therefore his proof of residence and cultivation is not false if he actually resided anywhere within the exterior lines of the claim and cultivated any portion of it.
10. LAPSE OF TIME.—Mere lapse of time is a defence in equity in cases not within the operation of the statute of limitations.
11. SALE OF PUBLIC LANDS.—A sale of public lands unauthorized by law is void, and the purchaser thereat acquires no right thereby, whether he knew or did not know of such want of authority.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

Rufus Mallory, for the plaintiff.

William Strong and Edward W. McGraw, for the defendants.

By the Court, DEADY, J. This suit was commenced on August 25, 1880, against the defendants, William Tichenor and Elizabeth his wife, to set aside and cancel the patent

issued to said defendants on February 5, 1866, for the donation claim No. 37, the same as alleged, being parts of sections 32 and 33 in township 32 south, of range 15 west, of the Wallamet meridian, and situate in Curry county, Oregon, so far as the same includes a certain "military reservation," or that the defendants be declared the trustees thereof for the plaintiff and required to convey the same to it.

On April 13, 1881, a supplemental bill was filed, in which the death of the defendant, Elizabeth Tichenor, was alleged; and by which her children, Jacob B. Tichenor, Anna Dart, and Sarah E. McGraw, and the husbands of the two latter, George Dart and Edward W. McGraw, were made defendants in the suit.

The bill alleges that in July, 1851, the defendant, William Tichenor, settled upon said donation number 37, under the donation act of September 27, 1850, and immediately laid out a town thereon, which he called Port Orford; that in September, 1851, Lieutenant Wyman, of the United States army, with the consent of William Tichenor, erected some buildings upon a portion of said town-site for the use of the United States soldiers, when stationed at that point; "that on October 16, 1851, General Hitchcock, then in command of the United States troops stationed at that place, ordered that a military reservation be established there, and that a tract of land be selected and set apart, and reserved for that purpose;" that soon after, and in pursuance of said order, said Wyman "caused a tract of land to be marked out for and as a military reserve," including the buildings aforesaid, and bounded, so far as it was within the lines of said donation, as follows: "Beginning where the east line of Redwood street in said town of Port Orford prolonged strikes the south line of Tichenor's claim, thence along said prolonged line and its continuation, the east side of Redwood street, to the south-east corner of Redwood street and Third street; thence along the south side of Third street, and said side continued until it strikes the west line of Tichenor's claim; thence along said line in a southerly direction to the south-west corner

of Tichenor's claim; thence along the south line of Tichenor's claim to the point of beginning;" of which acts said William Tichenor had notice and consented thereto, and that about March 17, 1852, said "military reservation was duly published;" that said William Tichenor, and Elizabeth, his wife, released the premises "to the department quartermaster-general for the use of the United States," and thereafter, on October 24, 1852, in order the more fully and certainly to secure the same to the United States, said defendants "released and quitclaimed to the United States all right or interest" in the premises, and "abandoned the same to the United States;" that on September 11, 1854, "the president of the United States formally declared a reservation for light-house purposes at said Port Orford that included said portion of the reservation, as well as other lands not within the limits of said donation;" that about September 29, 1856, said William Tichenor made the proof of his four years' residence and cultivation upon the donation claim aforesaid, as required by said donation act, before the officers of the proper land office, and "fraudulently" included therein so much of the reservation aforesaid as fell within the lines of his donation, "whereas in truth and in fact he had not so resided upon, cultivated, or claimed" the same "as a part of his donation" after "the said military reservation was marked out;" that "by means of said false proof," said William Tichenor "induced the officers of the United States," on February 5, 1866, to issue a patent for the whole of said donation, including the tract so reserved, to himself and wife—the north half to the former, and the south half to the latter; that the portion of said reservation included in said patent lies within the wife's half of the donation, and the said patent was so far procured by said William Tichenor "in fraud of the rights of the United States."

The bill then proceeds with a sort of restatement of the case upon "information and belief," to the effect, that after said reservation was marked out, said William Tichenor surrendered all control of the portion within his donation to the United States; that afterwards said William Tichenor

was appointed collector of customs at the port of Port Orford, before which time the troops had been withdrawn from said place and the reservation left in the charge of an agent of the United States; that by permission of the United States he occupied one of the buildings on said reservation, as collector aforesaid, but afterwards made a claim to the same as against the United States, whereupon he was removed therefrom and the premises again placed in the charge of an agent; that in October, 1864, said William Tichenor and others drove said agent "away from said premises by force," and they were arrested therefor, "by the military authorities of the United States," and imprisoned in Fort Alcatraz "for a considerable time;" that upon being released from said imprisonment said William Tichenor "pledged his word of honor that he would not interfere with or in any manner lay claim to the said" reservation, but notwithstanding such pledge "he afterwards laid claim to said land and made final proof of residence and cultivation thereof as herein before stated, and so fraudulently and wrongfully procured the patent therefor as herein stated."

The defendants demur to the bill, and for cause of demurrer say: 1. The court has no jurisdiction, because the plaintiff has an adequate remedy at law; 2. The plaintiff is not entitled to the relief asked upon the case stated; 3. The bill is multifarious; 4. It is without equity; in this, *a*. The boundaries and extent of the alleged reservation are not given with any certainty or exactness; nor does it appear that it included the premises in controversy; *b*. It does not appear that it was made for a "fort;" nor that it does not exceed twenty acres in extent, but the contrary; *c*. The reservation does not appear to have been made on public lands; nor that it was made under the authority of the president; *d*. No facts constituting the alleged fraud on the part of the defendant, William Tichenor, are stated; *e*. The alleged reservation is void, as appears from the bill; and *f*. That Elizabeth did not execute a legal conveyance of the premises to the plaintiff.

There are no maps or diagrams of the locality or the

Tichenor donation or the alleged reservation attached to the bill, and the description of the premises contained in it conveys no definite or certain information as to their location or quantity, unless reference is had to the public surveys.

Authenticated copies of these and of the patent to the Tichenors, with a copy of the proofs upon which it issued, and the official survey of the donation No. 37 thereto attached, were submitted by counsel for the plaintiff on the argument of the demurrer, and the facts contained in them will be referred to and considered as a part of the bill or as official acts of the executive department of the government within the judicial knowledge of the court.

And first, the bill is incorrect in describing the donation No. 37, in effect, as being only parts of sections 32 and 33 of township 32, south of range 15 west. From the surveys it appears that said donation comprises four hundred and four and fourteen hundredths acres in said sections 32 and 33, and also two hundred and thirty-seven and twenty hundredths acres in sections 4 and 5, of township 33, south of the same range; and that the premises in controversy in this suit, lie wholly in the southwest quarter of said section 5, and probably contain not to exceed twenty acres, while the remainder of the reservation marked out, as alleged in the bill, lies immediately to the westward of the Tichenor donation, and taken altogether contains over two hundred acres.

The allegation that the defendant, William Tichenor, after his release from Alcatraz, in 1864, made final proof of his residence and cultivation on the donation No. 37, is also erroneous, as appears from the bill itself and the documents submitted therewith—said final proof having been made some eight years before that date.

On an extract from "the surveyor-general's map of Oregon," at sundry points on the line of the coast, of which Port Orford is one, certain circular-shaped tracts containing no specified quantity, were surrounded with a blue shading, and on September 11, 1854, the president indorsed thereon —"Let the tracts shaded blue on the within diagram be reserved for light-house purposes. (Signed) Franklin Pierce."

On September 15, 1854, this diagram was sent by the commissioner of the general land office to the surveyor-general of Oregon, with a letter informing him that the president "has directed the reservation of a sufficient quantity of land at each point for light-house purposes, as follows: * * * at Cape Orford, or north cape of Tichenor bay;" and instructed him "to cause the same to be noted on the maps and documents" of his office, so that they would not be overlooked when the surveys of the public lands should be extended to these points: and added—"The lighthouse board has promised to furnish this office with descriptions of the exact locations when made, and copies thereof will be forwarded to you when received."

But it does not appear from the public surveys that any note or memorandum of any such reservation was ever entered or made thereon. In fact, no specific reservation was made or designated by the president's order. It was, in legal effect, only a precautionary direction, that reservations *should* be established at the points named, when the surveys were extended there; and evidently it was contemplated that the final location and description of them would be made by the lighthouse board and furnished to the land office for formal entry on the maps of the public surveys.

A reservation for light-house purposes at that date could only be made by authority of the president upon the assumption that it was a "needful public use;" and then it could only contain twenty acres. How much land was contained within the blue lines on the diagram indorsed by the president on September 11, 1854, no one knows; nor were they intended to do more than to indicate the point or headland where such reservation should be made thereafter.

But it is now understood that so far as this case is concerned, the claim that the premises in controversy are within a light-house reservation is abandoned. And it is admitted by the counsel for the plaintiff, that if there is a reservation for light-house purposes at Port Orford, it lies wholly to the south and west of the Tichenor donation over on the headland.

Besides, it was not in the power of the president to establish or declare a reservation for light-house purposes upon land already reserved for military or other purposes. If there was a valid reservation established at Port Orford prior to September 11, 1854, for a military post, as claimed by the plaintiff, the land contained in it was thereby appropriated and withdrawn from the public domain, and could not be thereafter otherwise appropriated except by the authority of congress. (*Wilcox* v. *Jackson*, 13 Pet. 513.)

As to the first point made by the demurrer, it is not well taken. True, if the patent was issued contrary to law as alleged, and that fact appeared upon the face of the patent when compared with the law, it is void, and a court of law would so pronounce. But the United States is also entitled to have such void patent cancelled, and may maintain a suit in equity for that purpose. (*U. S.* v. *Stone*, 2 Wall. 535; *U. S.* v. *C. P. Railway Co.*, 9 P. C. L. J. 340; *W. S.* v. *Mullan*, 9 Id. 116.) Neither is the objection that Mrs. Tichenor's conveyance or quitclaim to the United States was not duly executed, of any moment.

At the date of the alleged conveyances, the claim was occupied by the husband as a settler thereon under the donation act, engaged in the performance of the conditions of residence and cultivation, on the completion of which the title to the land would inure to him and his wife in equal parts. In the mean time, the wife had no control over or interest in the premises. She was not a settler, and her husband could occupy, or dispose of, or abandon his possessory right in his claim without reference to her. When her husband complied with the conditions of the act making the grant, then she became the owner as the direct donee of the United States, of the one half of the land included in her husband's settlement. But until then, it was in the power of the husband to abandon or dispose of his location or possessory right as he saw proper, and thereafter neither he nor his wife would have any interest in the premises, under the act. (*Lamb* v. *Starr*, 1 Deady, 360; *Fields* v. *Squires*, Id. 316; *Hall* v. *Russel*, 111 U. S. 509; *Vance* v. *Burbank*, 520.)

Neither did these conveyances of William and Elizabeth Tichenor have the effect to vest any interest in the premises in the plaintiff. Irrespective of the fact that the grantors in these deeds had nothing in the premises to convey, except the possessory right of the settler, William Tichenor, there was no authority upon the part of the grantee to purchase, and, therefore, they were, as conveyances, void and inoperative. By section 7 of the act of May 1, 1820 (3 Stat. 568; sec. 3736 R. S.), relating to the treasury, war, and navy departments, it is provided: "That no land shall be purchased on account of the United States, except under a law authorizing such purchase." It is not claimed that there was any law authorizing any one to purchase this property, and without such authority the purchase was void. (11 Opin. 202.)

The only effect that can be given to these writings in this case is, as evidence that the settler then and thereby abandoned so much of his claim, whereupon it again became a part of the public domain, and might be appropriated by any one to any purpose or use authorized by law.

The authority to establish a reservation of the public lands in Oregon for any purpose, is found in section 14 of the donation act of September 27, 1850 (9 Stat. 500), and section 9 of the act of February 14, 1853 (10 Stat. 158), amendatory thereof. In the first it is declared: "That such portions of the public lands as may be designated under the authority of the president of the United States, for forts, magazines, arsenals, dockyards, and other needful public uses, shall be reserved and excepted from the operation of this act: *Provided*, That it shall be deemed necessary, in the judgment of the president, to include in any such reservation, the improvements of any settler made previous to the passage of this act, it shall in such case be the duty of the secretary of war to cause the value of such improvements to be ascertained, and the amount so ascertained shall be paid to the party entitled thereto out of any money not otherwise appropriated."

The pre-emption act of September 14, 1841 (5 Stat. 657), was not extended over Oregon until July 17, 1854 (10 Stat.

305), and this is the first act of congress providing for the disposition of or affecting the title to public lands in Oregon; unless it be the grant to certain religious societies of the missionary stations occupied by them, contained in section 1 of the act of August 14, 1848. (9 Stat. 323; *Parish* v. *Lownsdale*, 21 How. 290; *Lownsdale* v. *City of Portland*, 1 Deady, 7, 13.)

By section 9 of the amendatory act, *supra*, the power of the president to reserve lands from the operation of said act was qualified, so that all reservations theretofore and thereafter made under said section 14 of the original act, should be limited to an amount not exceeding twenty acres at any one place, except in the case of "forts," when the amount should not exceed six hundred and forty acres at any one place.

The power to dispose of the public lands is granted to congress. (Art. IV, sec. 3, U. S. Const.; *U. S.* v. *Gratiot*, 14 Pet. 537.) No appropriation of them can be made for any purpose but by the authority of congress. (*U. S.* v. *Fitzgerald*, 15 Pet. 421.) By the donation act, congress disposed of all the public lands in Oregon to persons who should become settlers thereon, and otherwise comply with the provisions of that act, except mineral lands, lands reserved for salines, and such portions thereof as might be designated by the authority of the president for "forts," etc.

The reservation must be designated—marked out—and appropriated to the permitted public use by the president or under his direction. What constitutes such a designation may be a question. At least, the reservation ought to be described or indicated with reasonable certainty as to limits and quantity in some public document or record, and probably, it ought to be noted on the maps of the public surveys. (*Wilcox* v. *Jackson*, 13 Pet. 512; *U. S.* v. *Fitzgerald*, 15 Id. 419.)

But it does not appear from the public surveys that a reservation at Port Orford was ever noted thereon for any purpose. Neither is there any allegation in the bill that the reservation was ever designated or marked on the map

of any survey—and what is more, that it was designated or authorized at all, by the president.

It may be admitted as suggested in *Wilcox* v. *Jackson*, 13 Pet. 513, that if the order directing the reservation to be made had been issued by the secretary of war—the head of the department through whom the president would speak and act upon the subject—in the absence of evidence to the contrary, it would be presumed that he acted by the direction of the president.

But neither General Hitchcock nor Lieutenant Wyman had any authority to designate or establish a reservation at Port Orford for any purpose. It is not alleged that they were acting in the premises under the authority of the president; and there is no presumption of law that they were.

It may also be admitted that General Hitchcock could direct his subaltern, engaged in military operations in Oregon, to establish and occupy a camp or fort on the public lands therein; or that the latter might do so under the circumstances without any direction from the former. But such use or occupation would not have the effect to impart any special character to the land or constitute it a reservation for any purpose, within the purview of the donation act. It would still remain open to the claim of any qualified settler under the act, and as soon, at least, as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler.

So soon as Tichenor became a settler upon this land under the donation act, there was no longer any power in the president to appropriate it for any purpose. It had thereby become private property, and could only be taken for public uses by authority of congress acting under the right of eminent domain, and upon making just compensation therefor. (Fifth Amend. U. S. Const.) And admitting that afterwards Tichenor abandoned the portion of his claim constituting the premises in controversy, and that it thereupon became a portion of the public domain, and was liable to be reserved by the authority of the president for any of the public uses specified in the statute, still there is nothing to

show that such reservation was ever made, and therefore Tichenor had the right to include it in his claim when he made his final proofs in September, 1856.

But even supposing there was a valid reservation of over two hundred acres established at Port Orford for military purposes prior to February 14, 1853, it became void thereafter, except as to twenty acres thereof; and until it was redesignated by proper authority, with boundaries including no more than this quantity, it had no legal existence anywhere. If there had been a reservation designated for the purpose of a "fort," it might have been extended over six hundred and forty acres. But there is no allegation in the bill that this reservation was made for such purpose; and the facts stated show plainly that it was not.

The bill characterizes it as a "military reservation;" but that is a term unknown to the law and means nothing, except that it may have been intended for a fort, magazine, arsenal, camp, post, or other military use.

A "fort" is something more than a mere military camp, post, or station—such as are usually established and occupied for a few years on the border between new settlements and the wild Indian tribes. The term implies a fortification or a place protected from attack by some such means as a moat, wall, stockade, or parapet.

In this sense, it is common knowledge that there never was a "fort" at Port Orford, or anything else than a military camp or post consisting of a few log cabins for the shelter of the troops, and the ordinary guard-house and parade ground, occupied by a small detachment of soldiers—often less than a company, under the command of a single lieutenant—which was abandoned in the summer of 1856 at the close of the Indian war in southern Oregon, when the Indians of that region were moved up the coast, on the reservations to the north of the Umpqua river.

Nor does there appear to have been any recognition of this post as a "fort" by congress, in directing it to be established, or appropriating money for buildings or fortifications there. Its occupation was a mere incident of the temporary

presence of a small detachment of soldiers in that region during the settlement of Indian difficulties.

Nor can the extraordinary transaction related in the bill, from which it appears that in 1864—eight years after Tichenor's claim to the premises as a settler under the donation act had been proven and allowed in the local land office—a military force without law or process was used to eject him therefrom, and remove him to another state, and confine him there in a military prison, until he was constrained to promise not to again lay claim to the premises, have any effect upon the standing of the plaintiff in this case, unless it is to make it a party by adoption to that illegal outrage upon the rights and liberty of an American citizen. A promise made under such circumstances has no legal obligation. And if the circumstances had been otherwise, it would not have given the plaintiff any new or additional right to the property. A mere promise or agreement without a lawful consideration cannot affect the title to land or the right to the possession thereof.

In the bill, it is alleged that the patent was "fraudulently" obtained by means of "false proof," but in what the fraud consists, or wherein the proof was false, is not stated. Such an allegation is not sufficient on demurrer. The bill should have gone further, and set forth the substance at least of the acts constituting the fraud, or stated wherein the proof was false. (Story's Eq. Pl., sec. 251; *Oakland* v. *Carpentier*, 21 Cal. 663; *Semple* v. *Hager*, 27 Id. 166.)

But on the argument and in the brief filed, counsel for the plaintiff rests his case almost wholly upon the ground that Tichenor obtained the patent to the premises in controversy by the use of false proof before the local land office, to the effect that he resided upon and cultivated the same, when he did not. And tacitly abandoning the ground for relief that the premises were reserved from the operation of the donation act, and therefore the patent was so far void, it is now claimed, that admitting there was no valid reservation thereof, still the patent should be cancelled on the ground that Tichenor did not reside upon and cultivate

the disputed tract as stated in his proof and recited in his patent.

Admitting that the United States may maintain a suit to annul a donation patent upon the ground that the proof of residence and cultivation upon which it issued was false, yet that is not the case attempted to be made by this bill, in which the ground of the relief sought is that the patent includes land legally reserved from settlement under the donation act, and is therefore so far void.

But this argument proceeds upon the radically erroneous assumption that the residence and cultivation required by the donation act must extend to or include every acre of the donation. On the contrary, it is only necessary that the residence and cultivation should be on some part of the tract on which the settler "proves up." In this case the residence and cultivation of the settler was upon the tract of land —within its exterior limits—on which he notified and made his final proof; and his proof to that effect cannot be false, even if it should turn out that some portion of the tract was not open to settlement. His proof was not, as it need not have been, to the effect that he lived upon and cultivated the particular twenty acres in controversy here or any portion of it; but only that he lived upon and cultivated some portion of a tract, not exceeding six hundred and forty acres, which included this twenty acres.

Admitting as the plaintiff does, that Tichenor resided upon and cultivated some portion of his donation for four consecutive years, there was no falsehood in his proof to that effect, even if some other portion of it had been withdrawn from settlement by a valid reservation. It was not his duty to know whether his claim included a part of a valid reservation and notify the land office of the fact, but rather the duty of the government to have the reservation, if any, properly surveyed and noted on the township maps of the public surveys for the information of all concerned—none of which appears to have been done.

Besides the plaintiff has been guilty of gross laches in the premises and its claim has become stale. The defendant, William Tichenor, had been in possession of the premises,

as a settler having made his final proof, for twenty-four years before the commencement of this suit, and had received and undisturbedly occupied the premises under his patent, for fourteen years prior thereto.

And although the statute of limitations does not run against the United States, it is subject nevertheless, when it comes into a court of equity to assert a claim, to the rules and defences peculiar to a court of equity. Such a defence is "the mere lapse of time and the staleness of the claim, in cases where no statute of limitations directly governs the case." (Story's Eq. Pl., sec. 813; Story's Eq. Jur., sec. 1520, and authorities cited in note 3.)

In this case all the elements of this defence are present, and the defendants ought to have the benefit of it.

The demurrer is sustained, and the claim of the plaintiff being stale and its bill without equity, the same is dismissed.

SAWYER, C. J., concurring. In my judgment, the facts alleged in the bill do not show a valid reservation of the lands described therein for any public purpose, or present any sufficient ground for equitable relief. I therefore concur in the order sustaining the demurrer and directing a decree dismissing the bill.

UNITED STATES *v.* EDWARD W. MCGRAW. UNITED STATES *v.* ELISHA H. MESERVEY, GEORGE DART. UNITED STATES *v.* JACOB B. TICHENOR, EDWARD W. MCGRAW, SARAH MCGRAW.

By Court, DEADY, J. These three suits were commenced on September 13, 1880, and heard and submitted on demurrer with the foregoing case of *U. S.* v. *William Tichenor et al.*, and the statement and opinion in that case is largely applicable to these.

They are brought to set aside and cancel four patents issued to the defendants for lands situate in Curry county, Oregon, and being parts of sections 5, 6, 7, and 8 of town-

ship 33 south, of range 15 west of the Wallamet meridian, containing in the aggregate about two hundred and fifty-five and forty-nine hundredths acres, as follows: To Jacob B. Tichenor, two patents, each dated October 20, 1864, the one for lot numbered 3 in said section 5, and the other for lots 3 and 4 of said section 6; lot 1 of said section 7, and lot 1 of said section 8, containing altogether seventy-four and one hundredth acres. To Elisha H. Meservey, one patent for the west half of the south-west quarter; the north-east quarter of the south-west quarter; the fractional north-west quarter of the south-east quarter, west of the donation survey of William Tichenor; and the water lots 4 and 5 of said section 5, containing one hundred and sixty-five and thirty-four hundredths acres; and—To Edward W. McGraw, one patent for lots 1 and 2 of said section 6, containing eighteen and sixty-four hundredths acres, upon the ground that said patents and the entries upon which they issued were allowed and issued contrary to law and in fraud of the rights of the plaintiff, because the lands included therein were a part of a "military reservation," lawfully established at Port Orford, prior thereto; all of which was known to the defendants prior to such entries.

The bills each allege the establishment of "a military reservation" at Port Orford in 1851, as in the case of William Tichenor, except the giving of the alleged quitclaims by him and his wife, and the erection and occupation of a military post there from 1851 to 1856, and its abandonment and temporary reoccupation in 1864, and the arrest and imprisonment of said Tichenor and his son, the defendant, Jacob B. Tichenor, as in that case; and in addition, that on March 30, 1864, the secretary of war ordered that the "post at Port Orford be made permanent according to previous action."

The allegation in regard to the reservation for light-house purposes is omitted. The description of the alleged reservation, of which only so much is given in the William Tichenor case as was necessary to locate the portion said to be within his donation, is as follows: "Beginning at a point where the east line of Redwood street, in the town of

Port Orford, in the county of Curry, Oregon, prolonged, strikes the south line of the donation land claim of William Tichenor and wife; thence along said prolonged line and its continuation to east side of Redwood street, in said town of Port Orford; thence along the south line of Third street, and said line continued until it strikes the west line of said Tichenor's said claim; thence in a north-westerly direction to the sea; thence southerly, following the sea to the place of beginning."

It also appears from the certified copies of said patents, and the entries upon which they were issued, and also an extract from the proclamation of the president, No. 685, that on May 2, 1862, the lands in said sections 5, 6, 7, and 8, except those "appropriated by law for the use of schools, military and other purposes, or claimed under the donation laws," were proclaimed for sale at the land office at Roseburg, Oregon, on October 13, 1862, for a period not exceeding two weeks, after which those remaining unsold were to be subject to private entry; that the lands patented to the defendants, as above stated, were purchased by them at the rate of one dollar and twenty-five cents per acre, at said land office, as follows: By Meservey, on September 25, 1862, upon a declaratory statement filed under the pre-emption law on May 9, 1862, and proof of compliance with said law, and the payment of two hundred and six dollars and sixty-seven cents; by Jacob B. Tichenor, upon cash entries, lot 3 in section 5 on May 2, 1863, and the remainder on July 7, 1863, and the payment of ninety-two dollars and fifty-two cents; by Edward W. McGraw, on a cash entry on July 18, 1871, and the payment of twenty-three dollars and thirty cents; and, that patents were issued upon these several entries, to the parties making them, as above stated.

Meservey and Tichenor answered the bill exhibited against them respectively, admitting the purchase of the lands by them as stated, and the issuing of the patents therefor, and averred that they had since sold and conveyed the same as follows: Meservey to George Dart on January 31, 1863, for the sum of five hundred dollars; Tichenor to

Sarah E. Tichenor, now Sarah E. McGraw, long prior to the commencement of the suit against him, for the sum of five dollars—which deeds were duly recorded, the first-mentioned one on February 2, 1863, and the second one prior to 1870; and deny that they ever had any knowledge that said lands were ever claimed as a reservation by the United States, or were not subject to private entry, and disclaim all interest in the premises since said sales and conveyances.

Thereupon the plaintiff filed an amended bill in each of these two cases, making said Dart a party defendant in Meservey's case, and said Sarah E. McGraw and her husband, Edward W. McGraw, parties defendant in Jacob B. Tichenor's case. To these amended bills and the original bill in Edward W. McGraw's case, the defendants demurred, assigning substantially the same causes of demurrer in each case as in Tichenor's case, and in addition thereto, that it appears from each bill: 1. That the plaintiff surveyed the lands in question, and offered them for sale at auction, and in default of bidders offered them to the defendant at one dollar and twenty-five cents an acre, who purchased them accordingly. 2. It does not appear that the defendant was guilty of any false representation or fraudulent concealment in connection with such sale. 3. It does not appear that the plaintiff has tendered to the defendant, or now offers to repay him, the money received for said lands. 4. It does not appear that the plaintiff has demanded a reconveyance of the premises.

The allegation of fraud is insufficient, and in the nature of things it cannot be made better. It was not the duty of the defendants to inform the officers of the United States that these lands had been lawfully reserved from sale, even if such was the case. But it was the duty of the plaintiff, through its proper officers, to know the condition of its lands in this respect, and act accordingly. Neither is the question of fraud a material one; for the plaintiff is not bound by the acts of its officers in the disposition of these lands, if they acted, as is claimed, without authority of law. As to whether these lands were open to entry, the defendants took the risk—purchased at their peril; and if, being

lawfully reserved, they were not subject to sale, the disposition of them by the officers of the land office, being a matter beyond their jurisdiction, was void, without reference to the knowledge or motives of the defendants in making the purchase. (*Wilcox* v. *Jackson*, 13 Pet. 511.)

The only ground, then, upon which these suits can be maintained, is that the lands in question had been lawfully reserved from entry by authority of the president before their sale to the defendants. If such a reservation did not exist, the lands were subject to sale, and the purchase of the defendants was lawful and valid.

Therefore the rules invoked by counsel for the defendants, as applicable to a suit for the rescission of a contract within the power of the parties to make, but procured by the fraud of one of them—as that the court will not interfere unless the parties can be placed *in statu quo*—that notice of the rescission must be given within a reasonable time, accompanied by an offer to return whatever of value has been received under the contract, are not in point. And yet it may be, that even in a case of a void contract or sale, as this is alleged to be, the court would not annul the patent, if it appeared that the vendor was negligent, and the purchaser acted in good faith, without providing that the decree should not take effect until the purchase money was returned to him. But if it appeared, that the purchaser had good reason to believe that the sale was not authorized by law, it would be proper to annul the patent and leave him to the mercy of congress for the purchase money.

Upon the question of whether there ever was a lawful reservation at Port Orford for any purpose, the facts in these cases are not any more favorable to the plaintiff's claim than in the Tichenor case. It does not appear that any reservation was ever made by the authority of the president. It does appear that the alleged reservation included more than two hundred acres, while the law, since February 14, 1853, limited the amount which might be reserved at one place for any purpose other than a "fort" to twenty acres. And while a reservation of six hundred and forty acres might lawfully have been made for a "fort," it

does not appear that a "fort" was ever established at Port Orford, but only a temporary camp, or unfortified post, which was abandoned as early as September, 1856, and never after actually occupied, except for a very short time in 1864, for some temporary and non-military purpose.

The alleged order of the secretary of war of March 30, 1864, by which it was directed that the "*post* at Port Orford be made permanent according to previous action," is the only new fact on this point in these cases. This order implies, as the fact was, that the post had fallen in disuse; and in all probability, it was procured in the aid of the person who was then occupying the old buildings, nominally as agent of the government, but really for the purpose of his private trade and business, and against the will of the apparent owner—William Tichenor—out of which controversy grew the subsequent illegal imprisonment of the latter by the military, in the interest of this same party.

But waiving this, and presuming that this order of the secretary was made by the direction of the president, what does it signify?

And first, it related to the "post" and not a reservation, and the object seems to be, not to make or ratify a reservation at Port Orford, bnt to direct that the post be "made permanent"—whatever that is—a direction which seems to have been generally disregarded; the "post," as has been said, was a mere collection of log houses in the town of Port Orford, and not upon any of these lands.

But if the order was intended to establish a reservation at Port Orford, it was void because: 1. It did not prescribe its boundaries or limit the amount as required by law; 2. If it was intended by the words "according to previous action" to have effect as a ratification of the reservation alleged to have been "mapped out" by Wyman in 1851, it was void because it contained over two hundred acres, while a reservation for the purpose of a "post" was limited to twenty acres; and 3. It is certainly void as to the lands entered by Meservey and Tichenor—two hundred and thirty-nine and thirty-five one-hundreths acres and twelve thirteenths of the quan-

tity in controversy—because they were purchased before the order was made.

Congress alone has the power to dispose of the public lands, and by its authority the premises in controversy were lawfuly sold to the grantees on these patents, unless before such sale they were legally designated under the authority conferred upon the president by section 14 of the donation act and section 9 of the act amendatory thereof (9 Stat. 500; 10 Id. 159) as a reservation for some of the "public uses" mentioned in said sections and in conformity with the restrictions imposed upon said authority by said section 9.

To entitle the plaintiff to the relief sought, it must prove that this authority has been exercised, so as to take these lands out of the general provision made by congress for their sale and disposition to private persons and uses. Upon the facts stated, and all legal and reasonable inferences that may be drawn from them, it does not appear that there ever was a valid reservation at Port Orford, or that there ever was an attempt to designate one by the authority of the President.

The plaintiff has also been guilty of laches in the assertion of these claims, and the equitable defense of lapse of time may well be allowed in these suits.

The demurrers are sustained, and the claims of the plaintiff being stale and the bills without equity, they are each dismissed.

UNITED STATES *v.* SAMUEL NICHOLSON.

DISTRICT COURT, DISTRICT OF OREGON.
JUNE 14, 1882.

1. SPACE APPROPRIATED TO PASSENGERS.—A space upon a vessel bringing passengers into the United States under the act of March 3, 1855 (10 Stat. 715, sec. 4252, R. S.), is not "appropriated" to their use within the meaning of the term or the object and policy of the statute, unless it is given up to their *exclusive* use; and, therefore, the dining saloon of a steamship carrying Chinese passengers from Hongkong to Portland, Oregon, in which such passengers were allowed to go and come during the day, but to which no number of them were allotted or assigned, and in which they neither ate nor slept, was not a space appropriated to their use.

Before DEADY, District Judge.

INFORMATION for violation of section 4253 of the revised statutes tried by the court without the intervention of a jury.

James F. Watson, for the plaintiff.

John W. Whalley, for the defendant.

DEADY, J. On March 29, 1882, the British steamship *Glenelg* sailed from the port of Hongkong with Chinese passengers for this port, and arrived at Astoria with them on May 7th.

On May 20th, the district attorney filed an information against the defendant, charging him, as master of said vessel, with a violation of section 4253 of the revised statutes, by taking thereon and bringing to Oregon one hundred and five more passengers than he was entitled to carry in the space appropriated to them.

The passenger list contains the names of six hundred and fifteen persons, nine of whom are described as "boys," although ranging from eleven to thirteen years of age. This list also contains the names of twenty-three Chinese, alleged to be on the ship's "articles," to wit: One interpreter, three stewards, four doctors, and fifteen cooks. In the case of the master of the British steamship *Anerly*, lately tried in this court, it was claimed that a similar lot of persons were not to be reckoned as passengers, but as a part of the crew, because their names were put on the ship's articles. But the test is, not where were their names; but what space did their bodies occupy? If they occupied the space appropriated to passengers, they are either passengers, or diminish the space appropriated thereto in proportion to their number. The result is the same in either case.

Whether the putting of these cooks, doctors, etc., on the articles is a mere device to evade the law, or a convenient contrivance to bring them under the discipline of the ship in the discharge of their duties towards their countrymen, is immaterial. As long as they occupy the space allotted to passengers, they are nevertheless to be counted as such.

In the case of the *Anerly* they were held to be passengers, and the contrary is not claimed in this.

Neither were there any "boys" on the list in the sense of the passenger act, which allows two "children" "over one and under eight years of age," to be counted as one passenger. (Sec. 4252, R. S.) Therefore it must be considered that the vessel carried six hundred and thirty-eight passengers.

By the Hongkong emigration officers' certificate, the vessel was entitled to take on six hundred and thirty-eight adult passengers, and it appears from the same that she had on board when she sailed six hundred and twenty-eight adults and "ten male children" between the ages of one and twelve. By the measurement of the surveyor of the port of Hongkong made under the American act, she was entitled to carry six hundred and thirty-five passengers; and by the measurement of the inspector at Astoria she might have carried in the spaces measured for passengers at Hongkong, six hundred and forty-five persons. But said inspector also found, and it is now so admitted by the defendant, that the after space on the "'tween decks," which was measured for forty-five passengers, was filled with ship's stores; and also that the after saloon on the main deck, which was measured for fifty-seven passengers, was not appropriated to their use; and this latter is the point in dispute.

The law provides (sec. 4252, R. S.), "the spaces appropriated" for the use of passengers shall not be otherwise occupied except with their "personal baggage;" and on the main deck shall be in the proportion of "sixteen clear superficial feet of deck" for each passenger.

The term "appropriate" is derived from the Latin, *ad* and *proprius*, and signifies "to take as one's own by exclusive right." (Wor. Dic.) A space, therefore, is not "appropriated" to the use of passengers so long as any one else is allowed the use of it also. This is the literal meaning of the word and the evident sense in which it is used in the statute.

Three measurements of the space in the saloon have been offered in evidence—the one made at Hongkong, giving it a

capacity for fifty-seven passengers, the one made at Astoria for sixty-seven passengers, and one made here by a competent person, Mr. Henry L. Hoyt, for seventy-two.

None of these measurements are official. Congress has not provided that any particular person shall make the survey, except the one made by the inspector upon the arrival of the vessel in the United States, and then the report of such survey is only *prima facie* evidence of a *compliance* with the law when approved by the collector. (Sec. 4264, R. S.) The inspector did not find that the law had been complied with, and there is no such report in the case. It is the duty of the master to know how many passengers his vessel can carry, or how many can be carried in any particular space on it, and to see that the provisions of the statute are complied with. (*The Anna*, Taney's Dec. 559; *United States* v. *Morton*, 1 Lowell, 179.) And if there is a dispute as to the measurement the court must decide it upon the evidence. In the mean time the law casts the responsibility upon the master, and if he allows his owners or charterers to overload his vessel, he must take the consequences.

But it is not necessary to decide between these conflicting measurements, because, upon the evidence, it is clear that the space in this saloon was never "appropriated" to the use of any of the passengers upon this vessel. The burden of the vessel is eight hundred and ninety-four and seventy-four one-hundredths tons, and she was built for carrying first-class passengers. This was the dining-saloon, and elegantly furnished. It contained four dining-tables from twelve to fourteen feet in length, when drawn out; a cushioned seat ran around the sides, from which the velvet cushions were removed during the voyage. The master and his officers took their meals there, and the master's cabin was an inclosure at one end of it, and opened into it. After the first few days out from Hongkong, and when the passengers began to recover from sea-sickness, they came on the main deck for exercise, and some of them were in the habit of going into the cabin daily during the cold weather, and warming themselves at the stove; and on some occasions some of them lay down on the floor near the same.

The defendant, who appears to have been very kind and considerate with the passengers, directed the steward to let them have the run of the ship, and he often sat in the saloon and talked with parties of them who could speak some English, particularly after the vessel broke her shaft, which she did about one hundred miles from this shore; and sometimes entertained them by playing on the piano or harmonium. But no particular passengers were ever assigned to this space; nor did any passenger eat or sleep there during the voyage; and if any were present when the officers sat down to their meals they respectfully retired.

This is the case upon the testimony of the defendant; and it is evident that this space was not appropriated to any fifty-seven or other number of these Chinese passengers. Probably not more than ten of them were ever in there at once, and seldom so many. None of them were berthed or allotted there; and the fact seems to be that when taking exercise on the main deck, as they were entitled to, they simply had the privilege of lounging in the saloon more or less during the day.

But the inspector who surveyed the vessel and counted the passengers testified that the chief officer who showed him round the vessel told him that the saloon was not "used" by the passengers, and his two assistants testify that they were present and heard the conversation.

At this time the master was on shore, and objection was made to the admission of the mate's declarations in his absence. But the mate was in the master's place for the time being, and his declarations while pointing out the spaces occupied by the passengers, concerning that matter, I think are a part of the *res gestæ*, and therefore competent. But be this as it may, the case is clear against the defendant upon the evidence introduced by him.

As was said by Mr. Chief Justice Taney, in the *Anna*, *supra*, "there is certainly nothing in the object and policy of the law to induce the court to restrain the operation of this clause of the statute, within narrower limits than its language naturally and justly imports. Before congress legislated upon the subject, the transportation of passen-

gers to this country, was, in many instances, conducted in a manner that shocked the moral sense of the community; the ships were crowded to excess; the places allotted the passengers not ventilated; and they were often, during the voyage, fed upon unwholesome food, or restricted to a very scanty allowance. The natural result was that ships were constantly arriving with contagious and infectious diseases on board; and after having lost, on the voyage, a great portion of the passengers, brought the survivors into the country so emaciated with disease as to become a public burden, and often introducing contagious and infectious maladies contracted on shipboard, endangering thereby the health and lives of our own citizens."

And although none of these evil consequences appear to have followed the violation of the law in this case, the construction and application of it as a preventive thereof, cannot be varied or modified on that account.

My conclusion then is, that the defendant is guilty of a violation of the law in bringing into this district one hundred and five passengers in excess of what he was allowed to carry in the spaces appropriated to them, for which the law will impose upon him a fine of fifty dollars apiece, or five thousand two hundred and fifty dollars in the aggregate.

JOHN CONNEL KING *v.* A. Y. HAMILTON.

CIRCUIT COURT, DISTRICT OF OREGON.
JUNE 21, 1882.

1. PROMISSORY NOTE.—A note for five hundred pounds sterling is payable in a certain sum of "money," and, therefore, negotiable and *prima facie* made upon a sufficient consideration.
2. POUND STERLING.—By section 2 of the act of March 3, 1873 (11 Stat. 603; sec. 3565, R. S.), it is provided that "in the construction of contracts payable in sovereigns or pounds sterling," each pound shall be valued at four dollars eighty-six cents and six and one half mills. *Held*, That in an action upon a note payable in pounds sterling, it is not necessary to aver or prove the value of such pound in money of the United States, but that the court will give judgment for the value of the contents of the note in money of the United States, according to the ratio prescribed by the statute.

Before DEADY, District Judge.

Ellis G. Hughes, for plaintiff.

William H. Effinger, for defendants.

DEADY, J. This action is brought by the plaintiff, a British subject, against the defendant, a citizen of Oregon, upon a promissory note alleged to have been made by the defendant on January 29, 1879, and delivered to "Mrs." John Pollock, "for the sum of five hundred pounds sterling, money of the United Kingdom of Great Britain and Ireland," payable in one year after date, with interest at the rate of five per centum per annum; which note was afterward duly transferred to the plaintiff, and is still unpaid. The complaint concludes with a prayer for judgment against the defendant for said sum of five hundred pounds and interest, or "its equivalent in money of the United States." Nothing is alleged as to where the note was made or made payable.

The defendant demurs because: 1. The complaint does not state facts sufficient to constitute a cause of action; and, 2. It does not appear that the note was made "for value."

Upon the argument of the demurrer the point made by counsel for defendant was, that the note was not made for "money" but a commodity, and therefore it was neither negotiable nor presumed to have been made upon a sufficient consideration, but that the same must be alleged as in the case of an ordinary simple contract. In support of the demurrer counsel cites *Commonwealth* v. *Haupt*, 10 Allen, 38; Edwards on Bills, 128; Byles on Bills, 92; *Robinson* v. *Hall*, 28 How. Pr. 342; Abbott's L. Dic., Money.

The rule that bills and notes must be for the payment of "money" only is admitted. Story on Bills, sec. 43; Byles on Bills, 92; Chitty on Bills, 133; Dan. on Neg. Inst., sec. 50.

But it is equally well established that they may be made payable in the "money" of any country—in its coins, "such as guineas, ducats, louis d'ors, doubloons, crowns, or dollars; or in the known currency of a country, as pounds sterling, livres, tournoises, francs, florins, etc.; for in all

these cases the sum of money is fixed by the par of exchange or the known denomination of the currency with reference to the par." Story on Bills, sec. 43; Dan. on Neg. Inst., sec. 58; Edwards on Bills, 137, 138; *Black* v. *Ward*, 27 Mich. 191; *Thompson* v. *Sloan*, 23 Wend. 74.

It follows that a note payable in pounds sterling or British sovereigns is payable in "money," just as much and as certainly, as if it was payable in dollars.

The case is different from a note made payable in "currency," which may be "money" only conventionally, but not legally. But where a note is made payable in a particular denomination of foreign money—as pounds sterling—it is payable in money the same as if it was payable in a denomination of domestic money. As was said in the court in *Thompson* v. *Sloan*, *supra*, a bill or note payable in money of a foreign denomination is negotiable, "for it can be paid in our own coin of equivalent value, to which it is always reduced by recovery. A note payable in pounds sterling and pence, made in any country, is but another mode of expressing the amount in dollars and cents; and is so understood judicially."

It is also said in the books, that the plaintiff in such case should allege and prove the value of the sum expressed in foreign money in the money of the United States; which has not been done here. But I apprehend that this is now unnecessary.

By section 2 of the act of March 3, 1873 (17 Stat. 603; sec. 3565, R. S.), it is provided that, "In all payments by or to the treasury," "the sovereign, or pound sterling," shall "be deemed equal to four dollars eighty-six cents and six and one half mills;" and this rule is further declared applicable to the appraisement of imported merchandise when the value of the invoice is expressed in pounds sterling, "*and in the construction of contracts payable in sovereigns or pounds sterling;*" and this valuation is declared to be the par of exchange between Great Britain and the United States.

The provision concerning contracts payable in sovereigns or pounds sterling is new in the legislation of the United States. In *The Collector* v. *Richards*, 23 Wall. 246, this act

came before the supreme court, and the opinion of Mr. Justice Bradley is instructive upon the subject under consideration. It seems to have been taken for granted that the pound sterling is money, and known as such to the court independently of the act of congress; and money too, that can, in a judicial proceeding, be converted into money of the United States upon proof of the par of exchange. He says: "Although the sovereign or pound sterling as a coin, has only existed since the year 1817, the amount of pure gold contained in the pound sterling (estimating the guinea at twenty-one shillings) has been one hundred and thirteen and one thousandth grains ever since the year 1717; and as the United States dollar contains twenty-three and twenty-two hundredths grains of pure metal, it only requires a process of simple division to show that the value of the sovereign is precisely what the second section of the act determines it to be. This intrinsic value of the pound sterling as represented by the gold coins of England, was a matter of such public notoriety as to need no extraneous inquiry on the subject. It was the public law of the British empire during the period of our own colonial history, of which all our courts were required to take judicial notice; and its continuance to the present time is a public fact, as well established as any other act of the British government."

The contract sued on here is a contract for the payment of "money," and not a "commodity." It is also a contract for the payment of pounds sterling, and therefore within the purview of the act of 1873, *supra*, which establishes the value of this foreign coin in money of the United States. It is not required to aver or prove what the law establishes, and therefore in giving judgment for the plaintiff in this action, it is only necessary to convert the five hundred pounds into dollars at the rate of 4.866½ of the latter to one of the former.

Beyond a doubt, then, this note was made for "money," and for a sum certain, because a note for any number of pounds sterling is only another form of expression for the equivalent in dollars, which equivalent is now prescribed by statute.

The case of the *Commonwealth* v. *Haupt*, 10 Allen, *supra*, in which the annual report of the mint was taken as the value of the pound sterling ($4.84.48), arose under the act of 1857 (11 Stat. 163), and was decided prior to the passage of the act of 1873.

The demurrer is overruled.

UNITED STATES *v.* WILLIAM CHILDERS.

DISTRICT COURT, DISTRICT OF OREGON.
JUNE 27, 1882.

1. GRANT TO THE NORTHERN PACIFIC RAILWAY COMPANY.—By the act of July 2, 1864 (13 Stat. 365), the odd-numbered sections along the line of the Northern Pacific Railway Company for forty miles on either side of the line in the territories, and twenty miles in the states, are set apart and devoted to the construction of the road of said corporation; but said act is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely, when and as fast as any twenty-five miles of said road is constructed and accepted by the United States; and in the mean time, the legal title to the unearned and unpatented sections is in the United States, who may therefore maintain legal proceedings against any one that unlawfully cuts timber thereon.

Before DEADY, District Judge.

James F. Watson, for the plaintiff.

William Childers, pro se.

DEADY, J. The defendant is accused by the information herein of the crime of cutting timber on the public lands of the United States, within the jurisdiction of this court, with the intent to dispose of the same, contrary to the statute of the United States.

The defendant pleads "not guilty," and submits the case to the court for judgment upon the following statement of facts, which it is agreed between himself and the district attorney, shall stand and be considered as the special verdict

of a jury, duly found and given in the case, upon a trial of the issue made by said plea, to wit:

"That the defendant, in the year 1880, went upon the north-east quarter of section 1, of township 2 north, range 8 east of the Wallamet meridian, situate on the south bank of the Columbia river, near Shell Rock, about twelve miles above the Cascades, in the county of Wasco and state of Oregon, under a contract with the Northern Pacific Railway Company, to purchase the same of it in five years thereafter, with a permit therein to cut timber thereon for the improvement of the premises; that the defendant built a house thereon, and constructed a flume upon which to float wood to the river, and afterwards sold his improvements upon the premises to a third person for one thousand dollars, and abandoned them; that during his occupancy of the premises, he cut about six hundred trees from about ten acres of the same, from which he made about one thousand two hundred cords of firewood, that he boated to the Dalles, a distance of about twenty-eight miles, and sold for four thousand eight hundred dollars; that said timber was worth, while uncut, about fifty cents a tree, or twenty-five cents a cord; and that the premises are within the limits of the grant to the Northern Pacific Railway Company, as provided in sections 3 and 4 of the act of July 2, 1864 (13 Stat. 365), granting lands to aid in the construction of said railway, but being as yet 'unearned' and unpatented because 'not opposite to and coterminous with' any 'complete section' or portion of the road of said corporation."

By section 3 of said act of July 2, 1864, it is provided: "That there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction" of its road and telegraph line to the Pacific coast, the odd-numbered sections of the public lands of the United States for forty miles on each side of the line of said road, through the territories, and twenty miles through the states, not otherwise appropriated "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office;" and by section 4

it is further provided: "That whenever said Northern Pacific Railway Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated" by the act, and that fact shall be made to appear to the president by report of commissioners as therein provided, "patents of lands aforesaid shall be issued to said company, confirming to the said company the *right* and *title* to said lands, situate opposite to and coterminous with said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company *conveying* the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid:" *Provided*, that only ten sections of land per mile "shall be *conveyed* to said company" on the line of the road east of the western boundary of Minnesota until the whole of said road east of said boundary is finished.

Section 6 of the act provides, that the president shall cause the lands to be surveyed for forty miles in width on both sides of said road, "after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act."

Upon this state of law and fact the question is, did the act of July 2, 1864, *supra*, vest in or pass the title to the odd sections along the line of the road, to the Northern Pacific Railway Company, as soon as said line was definitely fixed and the plat thereof filed in the general land office, or does it remain in the United States until it is earned by the company by the construction of the road opposite thereto and the issue of the patent therefor?

The case of *Schulenberg* v. *Harriman*, 21 Wall. 44, is a leading case on this subject. There the act under consideration (June 3, 1856, 11 Stat. 20) was held to be a present

grant to the state of Wisconsin, and that the legal title thereby passed to the state. But besides the words of grant similar to those in section 3 of the Northern Pacific Railway act—"that there be and is hereby granted"—the Wisconsin act also provided that the lands embraced therein should "be subject to the *disposal* of the legislature," and that in case the road they were given to aid in the construction of was not built in ten years, the lands remaining unsold should *revert* to the United States; and no provision was made in the act for issuing patents to the lands, nor did it contain any clause which purported to, or could be construed to restrain or limit the operation of the words of present grant.

The court held that the legal title to the lands passed to the state, and therefore it was the owner of logs cut thereon, and was entitled to the benefit of the usual remedies for their removal or conversion.

The doctrine of the case is succinctly stated by Mr. Justice Field, in his opinion, as follows:

"They [the authorities] establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts."

But in my judgment, the clauses in section 4 of the act under consideration, concerning the *conveyance* of the lands granted to the corporation as each section of twenty-five miles of the road is constructed and accepted by the grantor, does restrain the operation of the words of present grant in section 3, so that it appears manifest, that while it was the intention of congress to set apart and devote the lands in question absolutely to the construction of the Northern Pacific Railroad, yet it did not intend to part with the title to them, until, and only so fast, as they were *earned* by the completion of the work.

This view of the question is further confirmed by the provisions contained in sections 8 and 9 of the act, the plain purport and effect of which is, that if the company does not

proceed with the work and complete the road as rapidly as therein provided, the United States may take the construction of the road into its own hands, and to that end, may dispose of or appropriate the unearned and unpatented lands in any way "needful and necessary to insure a speedy completion of the road."

Such a power is compatible and consonant with the idea that the lands were devoted by congress to the construction of the road, while the legal title and control of them should remain in the United States until the lands were earned by the company in the construction of the same, but incompatible with the idea of an absolute grant to the corporation *in præsenti*, that would entitle it to dispose of, encumber, or squander the lands in advance of the construction of the road, and thereby prevent the United States from completing it by this means, in the contingency contemplated.

In *Rice* v. *Railway Co.*, 1 Black, 358, it was held that an act giving lands to the territory of Minnesota, to aid in the construction of a railway therein, by words of present grant —"there is hereby granted"—did not pass the title to the territory, taken in connection with another provision in the act to the effect that no title should vest in the territory until twenty miles of the road were completed and accepted by the secretary of the interior, when a patent should issue for so much of the grant, and so on, as often as any twenty miles of the road were so completed and accepted. This ruling was approved in *Schulenberg* v. *Harriman*, 21 Wall. 62.

And although there is no express declaration in the Northern Pacific act that the title shall vest in the corporation until the completion of the road or portions of it, yet the legal effect of the clauses therein, which provide for conveying and confirming the title to the company, by patent only, upon the completion of the road or portions of it, is the same.

My conclusion then is, that the legal title to the unearned portions of this grant—the odd-numbered sections opposite to which the road has not been completed and accepted—is still in the United States.

Subsequent to the grant and the adoption of the line of

the road, and prior to its construction, the relation between the United States and the corporation is analogous to that of vendor and vendee—the latter being in possession under a contract to purchase and receive a conveyance upon the payment of the purchase money or the performance of the act constituting the consideration for the sale.

The premises upon which the defendant cut the timber in question being a part of these unearned lands, he is guilty of violating section 4 of the act of June 3, 1878 (20 Stat. 90), which enacts that any person who shall unlawfully cut any timbef growing on any land of the United States in Oregon, with intent to export or dispose of the same, shall be guilty of a misdemeanor, and on conviction thereof fined not less than one hundred dollars nor more than one thousand dollars.

WILLIAM BYBEE v. A. W. HAWKETT ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.
JULY 1, 1882.

1. PARTNERSHIP.—A contract between three persons to operate a "mining property as a company," creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of said enterprise; and this, notwithstanding the fact that such contract also provides that there shall be no division of profits between the parties until two of them are reimbursed therefrom the money expended in the purchase of two thirds of the property from the other one, and the cost of improving the same.
2. MORTGAGE.—The mortgagee of a mortgage to secure an antecedent debt is not regarded as a purchaser, and, therefore, the lien of his mortgage will be postponed to that of a prior but unrecorded one.
3. SUIT TO ENFORCE THE LIEN OF A MORTGAGE.—In a suit to enforce the lien of a mortgage, a subsequent mortgagee, who is made defendant on that account, can not set up a claim or have a decree against the plaintiff for the amount of his debt, upon the ground that the plaintiff is personally liable to him therefor, as partner of his mortgagor.
4. PARTNERSHIP WITH A MEMBER OF ANOTHER PARTNERSHIP.—Although A may be interested with B in his interest in a partnership, consisting of B and two others, that does not make him a member of said last-mentioned partnership.

Before DEADY, District Judge.

B. F. Dowell and *Walter W. Thayer*, for the plaintiff.

E. C. Bronnaugh, for the defendants E. C. Robinson, Jesse Robinson, and Magruder & Haymond.

DEADY, J. This case was before the court (6 Saw. 593) on a motion by the plaintiff to remand it to the state circuit court for the county of Jackson, where it was commenced on June 18, 1879; and the statement of the case there made is now referred to. Afterwards, on May 2, 1881, exceptions for impertinence were allowed to certain portions of the reformed bill, including those relating to the Irwin note for one thousand three hundred and twenty-eight dollars and thirty-three cents (erroneously printed in 6 Sawyer as three thousand one hundred and twenty-eight dollars and thirty-three cents), the note to Kubli and Bolt for eighty-five dollars and forty-three cents, signed by the plaintiff, and the eighty-six dollars and twenty-four cents due from Irwin to the plaintiff.

The cause is now argued and submitted on the pleadings, including the answers of the defendants Jesse Robinson, E. C. Robinson, John L. Robinson, and C. Magruder for himself and partner, Benjamin Haymond, and the testimony and exhibits—the defendants A. W. Hawkett, William W. Irwin, William Smith, Kasper Kubli, John Bolt, James F. Gazley, A. A. Fink, and Thomas Robinson, having failed to answer.

It appears that on October 13, 1877, James Neely, as administrator of the estate of Evan Taylor, deceased, sold to the plaintiff, William Bybee, a certain mining property known as "the Taylor claims," situate in Josephine county, Oregon, and described as lot 5 in section 35 of township 35 south, range 7 west, and two water rights and ditches approximate thereto, for the sum of three thousand one hundred dollars—there being an agreement at the time between said Bybee and William Smith and William Irwin, that the latter should each be entitled to a conveyance of an undi-

vided one third of the property upon the payment to Bybee of one third of the cost thereof, and that in the mean time they would work the mine together, which they did for about six months. On March 1, 1878, Bybee bought out Smith for five hundred dollars, and gave him his note for the amount payable in two years. On July 26, 1878, Neely, by order of the proper court and in pursuance of the sale aforesaid, conveyed the premises to Bybee, who on the same day sold and conveyed an undivided two thirds thereof to the defendants, A. W. Hawkett and E. C. Robinson; and on the same day, and as a part of the transaction, said Bybee entered into a written agreement with said Hawkett and Robinson in the words and to the effect following:

"That whereas, the party of the first [Bybee] has sold to the parties of the second part [Hawkett and Robinson] the undivided two thirds of certain mining property in Josephine county, Oregon, known as the Taylor claims, and said parties agree to mine and operate said mining property as a company; and as a consideration for said two thirds interest the said parties of the second part are to pay certain debts. It is therefore agreed as follows: That said parties of the second part agree to pay and assume six thousand and ninety-eight dollars and twenty-four cents in the following debts, to wit: To James Neely, administrator of Evan Taylor's estate, two thousand seven hundred and eighty-four dollars and fifty-six cents; Kaspar Kubli, eight hundred and eighty-two dollars and sixty-eight cents; Dan. Green, five hundred dollars; William Smith, five hundred dollars; and agree to pay to William Bybee one thousand four hundred and thirty-two dollars. The said amounts to be paid down or arranged upon such time as may be agreed on between the parties of the second part and the persons to whom said debts are due."

The agreement then further provided: 1. That the "parties of the second part agree to put on said claims at their own expense such improvements and additional machinery as may be necessary;" 2. That all the "amounts above mentioned, and also the cost of any additional improvements which may be put on to said claims, are to be repaid to said

parties of the second part out of the profits taken out of said mines when the same shall be taken out and before any dividends shall be made to the members of said company;" 3. That the profits of said mines after repaying the amount of said debts and the cost of said improvements "shall be equally divided between the then members of said company aforesaid;" and, 4. That said property and "the improvements which shall be hereafter put on said claims are to be held as a lien and security for the payment of the debts above specified."

This agreement was executed at Jacksonville, Oregon, by Hawkett, for himself and E. C. Robinson, who was then at Oakland, Cal., living with his father, the defendant, Jesse Robinson. The defendant C. Magruder was also present, and paid out for E. C. Robinson, upon the purchase of the property, to Neely, two thousand seven hundred and eighty-four dollars and fifty-six cents, the balance due from Bybee to the administrator on the sale of the property to him in October, 1877, to Bybee four hundred and thirty-two dollars, to Kasper Kubli a check upon E. C. Robinson for five hundred dollars, which was duly paid. At the same time that Hawkett and Robinson purchased from Bybee, it was arranged to buy out Irwin's equity for two thousand five hundred dollars, which was paid as follows: five hundred dollars by Hawkett in cash furnished by E. C. Robinson; by receipt for five hundred dollars due Magruder from Irwin on account and by the undertaking of Hawkett and Bybee to pay eighty-five dollars and forty-three cents due said Kubli from Irwin, and of Hawkett to pay eighty-six dollars and twenty-four cents due from Irwin to Bybee.

For the balance of the sum due Bybee, Hawkett for himself and Robinson gave a promissory note for one thousand dollars payable to the order of Bybee one day after date with interest at one per centum per month, and for the balance due Kubli they gave a similar note for three hundred and eighty-two dollars and sixty-eight cents with Bybee as surety. Nothing has been paid on these notes by Hawkett or Robinson, nor upon the sums due Green and Smith as

aforesaid. The sums due Green and Smith have since been paid by Bybee, and on December 2, 1879, Kubli obtained a judgment for four hundred and eighty-nine dollars and fifteen cents on the note given him for three hundred and eighty-two dollars and sixty-eight cents which Bybee satisfied on July 6, 1881.

Hawkett and E. C. Robinson commenced operations on the mine in September, 1878—digging a ditch of some length and putting up a giant and pipe furnished by Jesse Robinson from California. About the first of January they commenced to work the mine, and in that month Jesse Robinson visited the mine and remained there until the following spring, giving more or less direction to its management. The mine did not prove remunerative, and Hawkett, who had put his skill and services as a miner into the venture against Robinson's money, on March 17, 1879, withdrew from the company and conveyed his third of the property to E. C. Robinson for the nominal consideration of five thousand dollars.

On May 13, 1879, E. C. Robinson mortgaged the undivided two thirds of the premises to the defendants Magruder and Haymond, to secure the payment of his note of the same date, made payable to said defendants thirty days after date for the sum of two thousand two hundred and ninety-five dollars with interest at the rate of one per centum per month; which mortgage was duly recorded on May 15, 1879. On May 14, 1879, E. C. Robinson again mortgaged the same interest in the premises to the defendant, Jesse Robinson, to secure the payment of his note of the same date made payable to said defendants, thirty days after date, for the sum of four thousand nine hundred and seventy-five dollars, with interest at the rate of one per centum per month; which mortgage was duly recorded on the same day; and on July 16, 1879, said Jesse Robinson assigned said last mentioned note and mortgage to his brother, the defendant, John L. Robinson of Tioga county, Pa., for the sum of four thousand three hundred dollars.

This suit has now diminished to a proceeding to enforce the agreement of July 26, 1878, including the lien provided

therein as a security for the payment of the debts therein specified. There is also an allegation left in the bill that the Robinsons did not truly account for the gold dust taken out of the mine and a prayer for an account. The answers of the defendants E. C. and Jesse Robinson state that only two thousand eight hundred dollars was taken out up to the commencement of this suit, when the mine passed into the hands of a receiver, where it has since remained, all of which and much more was expended in improving and working the mine; and whatever the fact may be, the evidence to the contrary is vague, trifling, and scarcely worthy of consideration.

The agreement of July 26, 1878, is practically a personal obligation of Hawkett and E. C. Robinson, and also Jesse Robinson, if he was a partner with them in the purchase of the mine, as the plaintiff alleges, to pay the debts therein specified and also a mortgage of the property to secure such payment.

The personal liability of E. C. Robinson and Hawkett, in case the property is not sufficient to pay the debts, is admitted, but that of Jesse Robinson depends upon the fact whether or not he was a partner with Hawkett and E. C. Robinson, in the purchase, on July 26, 1878. He was not known in the transaction as such. Bybee did not give him credit or part with anything upon the faith of his being responsible for it as a partner or otherwise. But he now alleges that Jesse Robinson was a secret partner in the purchase, and the burden of proof is upon him to establish the fact, before he can hold him responsible as such.

The evidence upon this point is conflicting and largely made up of admissions by members of the company to the effect that J. R. was a partner, which are clearly inadmissible for that purpose (1 Greenl. Ev., sec. 177), and the casual and indefinite conversations and remarks of J. R. concerning the management and prospect of the business while he was at the mine, which might have proceeded from the fact that he was interested as a partner or as the father of E. C. R. and the principal creditor of the company.

Hawkett is the only witness that testifies that J. R. ever

said he was a partner in the purchase of the mine, and his statement is to the effect, that J. R. was the real party in interest, but that he did not want to be known in the matter. But his credibility is affected somewhat by the fact that he may be now trying to shift the responsibility of a losing adventure undertaken upon his judgment and recommendation, and is very much affected by the further fact, that on May 11, 1879, he deliberately wrote to a person seeking to collect one of the debts specified in the agreement of July 26, 1878, that J. R. had no interest in the matter, except that he had loaned him and E. C. R. money to open the mine with.

Both E. C. R. and J. R. deny in their answers that the latter was a partner in the purchase or working of the mine, and the evidence of the plaintiff is not sufficient to establish the partnership against these denials, if at all.

It may be and probably is true, that there was some private agreement or understanding between the father and the son by which the former was interested with the latter in this adventure, and that so far they sustained to one another the relation of partners instead of that of debtor and creditor, but that would not make J. R. a partner of the firm of Hawkett and E. C. Robinson, or Hawkett, Robinson, and Bybee. No one can become a member of a firm without the knowledge and consent of all the partners. (Collyer on Part. 5.)

The agreement of July 26, 1878, was not recorded until May 30, 1879, and subsequent to the execution and record of the mortgages to Magruder and Haymond and Jesse Robinson, but before the assignment of the latter to John L. Robinson. But both these mortgages and this assignment were made in consideration of previous indebtedness, and, therefore, the mortgagees and assignee are not entitled to be regarded as purchasers. Besides, such mortgagees must be held upon the proof to have had actual knowledge of the lien provided for in the agreement of July 26th, and therefore took their mortgages in subordination thereto, irrespective of the question of priority of record. The assignee had constructive notice of this lien also, when he took

his assignment, as the agreement had then been admitted to record. (Jones on Mort., sec. 458, and note.)

These conclusions are admitted by counsel for the defendants, E. C. R. and J. R., but he also claims that Bybee was a partner in the working of this mine, from the date, and by virtue of the agreement of July 26th, and that so much of the debt due M. and H. as arose from the furnishing of supplies to the company, Bybee, as a member thereof, is personally liable for, and therefore, his lien upon this property or the proceeds of it, ought to be subject in this suit to the satisfaction of this claim. It is admitted that the debt for which the mortgage was given to J. R. is not a demand against the company, it being wholly for money and material furnished Hawkett and E. C. R. to enable them to open and improve the mine as per their agreement with Bybee. It is also admitted that five hundred dollars of the debt for which the mortgage was given to M. and H. is not a demand against the company, it being the sum advanced by Magrnder to Irwin for E. C. R. on the purchase of his interest in the mine—the advance being made by the settlement of an account of that amount which Irwin owed Magruder.

The remaining one thousand seven hundred and ninety-five dollars of this debt it is claimed by Magruder in his answer was due from "Hawkett and E. C. Robinson," *or* "the company mentioned in said agreement of July 26th" "for goods, provisions, etc., furnished to said company, and for freighting done by said firm of M. and H. for said firm or company of the Josephine mine" prior to May 13, 1879.

This is indefinite as to whether the goods and freighting were furnished to Hawkett and Robinson while opening the mine, or to Bybee, Hawkett, and Robinson while operating it. In the first case, Bybee would not be liable under any circumstances. No testimony has been offered on the subject except the answer of Magruder, and that is not satisfactory. In the nature of things, these supplies and this freighting would be furnished to improve the mine as well as to operate it. The burden of proof is, I think, upon M. and H. to show that these things were furnished to a

company of which Bybee was a member. Besides, the fact that he settled with E. C. Robinson, who then represented Hawkett as well as himself, and took his individual note for the amount and a mortgage upon his individual interest in the mine as security, without paying any attention to Bybee or his interest, is a circumstance tending to show that Magruder did not then regard the debt as due from Bybee.

On the other hand, counsel for the plaintiff insist that Bybee was not, by the terms of the agreement of July 26th, to become a partner with H. and R. until the proceeds of the mine had reimbursed them for the money expended in its purchase and improvement; which it is admitted it never did.

In my judgment, the agreement created a partnership from its date, consisting of Hawkett, Robinson, and Bybee, for the purpose of operating the mine, and that whenever it was operated by any or either of them they all became liable for the debts thereby incurred. And the fact that a division of profits between the partners was postponed until the money advanced by Hawkett and Robinson for the purchase of a two-thirds interest and the improvement of the whole of it, does not affect the unqualified agreement of the parties in words of the present tense—"to mine and operate said mining property as a company."

In *Beauregard* v. *Case*, 91 U. S. 134, a question of partnership arose under very similar circumstances. In the course of the opinion of the court, delivered by Mr. Justice Field, it is said: "There were in this agreement all the essential conditions for the creation of a partnership—provision for a union of services and money and a division of profits and losses. The postponement of a division of profits between the three partners until the capital advanced by two of them should be refunded, with interest, did not alter the character of the agreement, as one of partnership, nor the liability of all the partners to third persons for debts contracted in the prosecution of its business."

But admitting the partnership, and assuming that this debt is a valid demand against the firm, and that therefore Bybee is liable therefor, I do not see how M. and H. can set

up their claim in this suit. So far as Bybee is concerned, this is a suit to enforce the agreement of July 26th as a personal contract against H. and E. C. R., and as a mortgage against the property. M. and H. are not parties to it, nor have they any rights in it, except by reason of the lien of their mortgage—and that to have their mortgage adjudged valid and assigned its proper place in the order of time and payment.

But it is admitted that it is subsequent in point of time to that of the plaintiff, and that its payment out of the proceeds of this property as a debt secured by a lien thereon must be deferred until that is satisfied. But the defendants have no standing in this suit or right in this property except as mortgagees, and that is subordinate to the plaintiff's. This is not a suit to recover anything from the defendants M. and H., and in which they can therefore plead a counter claim or set-off. Neither can they, if they would, convert their answer into a species of cross-bill, and subject the sum which the plaintiff may obtain in this suit to enforce his mortgage against the property in question, to the satisfaction of an independent personal claim which they may have against him. If they wish to enforce such a claim against him as a member of the partnership created by the agreement of July 26th, the courts are open to them to bring their action against him for that purpose.

The plaintiff paid the balance of the debt to Kubli, of three hundred and eighty-two dollars and sixty-eight cents, as follows: He signed the note of Hawkett and Robinson, therefore, as surety, drawing interest at one per centum per month, upon which Kubli obtained judgment, which the plaintiff paid. And he now seeks to recover what he paid on that judgment, including interest, costs, and attorney's fee, rather than the original amount, with legal interest.

But the liability of H. and E. C. R. arises upon the agreement of July 26th, which is to pay the debt specified therein with such interest as the law will allow thereon, none being agreed upon, and the costs properly chargeable against them in this suit for its collection. Whether plaintiff has gained or lost in his contract as surety or in the acquisition of these

claims is nothing to the defendants. As has been said, their liability in this suit is measured by the agreement of July 26th.

The plaintiff on his own account and as the representative of the other creditors mentioned in said agreement has the first lien upon this property for the sum of two thousand three hundred and eighty-two dollars and sixty-eight cents, the aggregate sum of said claims with interest thereon at the legal rate, to wit, ten per centum per annum from July 26, 1878, to January 25, 1880, a period of one year and six months, and at eight per centum from then to July 1, 1882, making in all the sum of three thousand one hundred and thirteen dollars and thirty-six cents, together with the costs and expenses of this suit, except as to the defendants against whom the bill is dismissed.

The defendants M. and H. have the second lien upon the undivided two thirds of the property for the full amount of their note and mortgage with interest as therein provided and the costs of their defence.

The defendant John L. Robinson, as the assignee of Jesse Robinson has the third lien upon said undivided two thirds of said property for the full amount of his note and mortgage, with interest as therein provided and the costs of his defence.

The decree of the court will be that the bill be dismissed as to the defendants who are not liable to the plaintiff in this suit and have no interest in the subject of it, namely, Jesse Robinson, Thomas Robinson, William W. Irwin, William Smith, Kasper Kubli, John Bolt, James F. Gazley, and A. A. Fink, and that they and each of them recover costs from the plaintiff; that the master of this court sell this property as upon an execution at law and apply the proceeds, after paying the costs and expenses of the sale, upon the claims aforesaid in the order specified; and if there is any remainder, pay one third thereof to the plaintiff and the other two thirds to the defendant E. C. Robinson.

A. H. TANNER *v.* DUNDEE LAND INVESTMENT CO. AND WILLIAM REID.

CIRCUIT COURT, DISTRICT OF OREGON.
JULY 5, 1882.

1. INTEREST ON NOTE.—Where a note is made payable at a future day "with" interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect.
2. SPECIFIC PERFORMANCE.—A contract to convey real property will be specifically enforced as prayed for by the plaintiff where its terms are admitted by the defendant, and the only objection made to such performance is based upon a construction of the contract, as to the part to be performed by the plaintiff, which in the judgment of the court is unsupported by the language of the contract or the circumstances of the case.

Before DEADY, District Judge.

THE plaintiff *pro se.*

Ellis G. Hughes, for the defendants.

DEADY, J. This suit was commenced in the state circuit court for this county and removed here by the defendants, one of whom is a British corporation and the other a British subject. It is brought to enforce the specific performance of a contract for the sale and conveyance of real property, and was heard on bill and answer.

It is alleged in the bill that the defendant, the Dundee Land Investment Co., on July 15, 1881, was the owner of certain real property bounded as therein described, without stating the quantity, and situate in King's addition to Portland, and on the same day its manager, the defendant William Reid, entered into a written contract with the plaintiff, in which he acknowledged the receipt of four hundred dollars from the plaintiff, as a part of the purchase price of two thousand five hundred dollars for said real property, then occupied by the plaintiff as a residence, and also thereby agreed that he would within sixty days, cause to be made and delivered to the plaintiff a warranty deed to

the premises from his co-defendant. The agreement is signed by William Reid, but not the plaintiff, and in addition to the foregoing contains the following condition or stipulation:

"It is also understood and agreed that the balance due upon said purchase price, to wit, the sum of two thousand one hundred dollars, shall be paid in twenty notes of one hundred and five dollars each, payable one every six months, with interest at ten per centum per annum upon each of said twenty notes of one hundred and five dollars each from their date; that is to say, the first of said notes shall become due and payable six months after the date thereof, and the second one year after the date thereof, and so on with the rest, and said notes shall be secured by a mortgage upon said property to be made, executed, and delivered at the same time said deed is delivered."

Within the sixty days the deed aforesaid was duly executed and delivered to the defendant Reid for the plaintiff, who still has the same in his possession, but refuses to deliver it to the plaintiff; and the plaintiff is still in the possession of the property, and has been, and still is ready and willing to perform his part of said contract.

The answer of the defendants admits the allegations of the bill, except as to the offer of the plaintiff to perform and the refusal of the defendant to do so, and alleges the fact to be that the defendants have been and are ready to deliver the deed to the plaintiff as provided in the contract, but that he refused and still refuses to make and deliver his twenty promissory notes, as aforesaid, payable one each six months from the date thereof, with interest at ten per centum per annum, and the interest then accrued upon the whole of said sum of two thousand one hundred dollars, or so much thereof as may remain unpaid.

On the argument, the plaintiff admitted that by the terms of the sale he was bound to give his twenty notes for the balance of the purchase money—two thousand one hundred dollars—payable one every six months, with the interest thereon from date, but the counsel for the defendants insisted that he was also bound thereby to undertake and promise in or

by said notes, that upon the payment of each of them he would also pay the interest then accrued and unpaid on all the rest of them; and whether he is so bound or not is the only question in the case. No authorities have been cited by either party, and none will be referred to by the court.

It is too plain for argument, that no interest is due on a promissory note, payable at a future day, "with interest," at a certain rate per annum, until the principal sum is due. The promise to pay the interest, is to pay it *with* the principal—at the time the latter becomes due. And if the payee or holder of a note claims that interest is due and payable thereon during the period the note has to run, he must show some special provision or agreement to that effect, before his claim can be allowed.

The only matter in this agreement or terms of sale upon which the defendants base their claim for notes with interest thereon, payable semi-annually, are the words—"upon each of said twenty notes of one hundred and five dollars"—as they occur in the clause declaring that the two thousand one hundred dollars shall be paid in twenty notes "payable one every six months with interest at ten per centum per annum *upon each of said twenty notes* of one hundred and five dollars each from their date."

But these words—"upon each of said twenty notes"—are used in this connection merely to emphasize the idea already expressed that each of said notes was to bear interest, and this is made still more apparent by what follows—"each from their date"—that is, each of these notes is to bear interest at the prescribed rate from its date. The words in this sentence, "each from their date," have just as much significance as the ones, "upon each of said twenty notes." Strictly speaking they are both superfluous; because it was already provided that the two thousand one hundred dollars should be paid in twenty notes, payable one every six months with interest at a prescribed rate—which could only mean that each note should bear such interest at and from its date.

But, if the plaintiff is bound by this clause to undertake to pay the interest on all the unpaid notes every six months

as one of them becomes due and payable, then he must agree to do so on each of them, not from the date of the last payment, "but from their date," which would require him to pay the first six months' interest on the last note nineteen times over, and so on. But the agreement itself resolves this matter very clearly under a *videlicet* in the following clause: "the first of said notes shall become due and payable six months after date thereof, and the second one year after the date thereof, and so on with the rest;" the plain purport of which is, that the principal and interest on each note was to become due and payable at once and together, and neither of them in instalments.

It may be that it was the intention of the defendant, Reid, or that it was in his mind, that the interest on this sum or the instalments of it which remained due from time to time should be paid semi-annually, but as he omitted to insert any provision to that effect in the terms of sale, he cannot now insist upon the delivery of notes to that effect as a precondition to the delivery of the deed.

A court of equity will decree a specific performance of a contract respecting real property where: 1. The contract is in writing; 2. Is certain and fair in all its parts; 3. Is for an adequate consideration; and 4. Is capable of being performed. (2 Story's Eq. Jur., sec. 751.)

There is no allegation in the answer of the defendants tending to show that the notes which the plaintiff offers to give and the contract appears to require were not an adequate consideration for the premises at the date of the sale, nor that any advantage was taken of the defendants in the sale or any mistake made in reducing its terms to writing.

The only objection made in the answer to a specific performance of the contract as prayed for by the plaintiff, is that the plaintiff has not offered to perform it according to the construction which the defendants now seek to have put upon the terms of sale—a construction which it appears to the court is altogether unsupported by the language of the writing or the circumstances of the case.

If there was a serious doubt about the terms of payment the court would refuse to enforce the contract against the

defendant's construction of it, but where there is no room for such doubt the contract must be enforced notwithstanding the defendants' objection.

The decree of the court will be that the defendant Reid deliver the deed of the defendant, The Dundee Land Investment Co., to the plaintiff within ten days and upon the delivery to him of the notes and mortgage for the two thousand one hundred dollars as provided in the terms of sale according to the judgment of this court, and that the plaintiff recover his costs.

W. S. CHAPMAN *v.* E. P. FERRY AND EUGENE WHITE.

CIRCUIT COURT, DISTRICT OF OREGON,
JULY 10, 1882.

1. DISCOVERY.—A demurrer will lie to an allegation in a bill, the answer to which may subject the defendant to anything in the nature of a penalty or forfeiture—as an allegation concerning the number of copies sold and on hand of a pirated map.
2. PENALTIES AND FORFEITURES.—The penalties and forfeitures given by section 4965 of the revised statutes (17 Stat. 214), for an infringement of a copyright, cannot be enforced in a suit in equity; and a prayer in a bill, that the plate and unsold copies of a pirated map be delivered up to an officer of the court for cancellation and destruction is demurrable, as asking the enforcement of such forfeiture.
3. DAMAGES.—Damages as well as profits may now be recovered in a suit in equity, for an infringement of a patent but not a copyright.

Before DEADY, District Judge.

H. Y. Thompson, for the plaintiff.

Frederick V. Holman, for the defendant.

DEADY, J. This suit is brought to obtain an injunction restraining the defendants from infringing the copyright of a "Map of the cities of Portland and East Portland and the town of Albina, Oregon," compiled and published by plaintiff; and for an account of sales.

The bill states in detail the steps taken by the plaintiff in 1874–5 to obtain the copyright of the map and his owner-

ship thereof ever since—the infringement of the same by the defendants on May 10, 1881, by the publication of five hundred copies of a map entitled "Map of the cities of Portland and East Portland and the town of Albina, Oregon;" and alleges that the same is substantially a copy of the plaintiff's, and an infringement of his copyright; that the defendants have sold three hundred copies of said map, at five dollars a copy, to the damage of the plaintiff three thousand dollars, and is still the owner of the plate upon which the same were printed, and the two hundred copies remaining unsold, which they continue to offer for sale. The prayer of the bill is, that the defendants may "answer all and singular the matters and things" set forth therein, and that they be required to surrender the copies on hand and the plate to an officer of this court "to be canceled and destroyed." The defendants demur to so much and such parts of the bill as seek to have a discovery as to the number of copies of their map sold or on hand, because the same will subject them to penalties and forfeitures, as provided in section 4965 of the revised statutes.

It is well established, that a defendant may "demur to a discovery which may subject him to anything in the nature of a penalty or forfeiture" (Story's Eq. Pl., sec. 583); and by the section of the revised statutes aforesaid the defendants are made liable to forfeit to the plaintiff the plate upon which their map was printed, and every sheet thereof, and also to pay a penalty of one dollar for every sheet found in their possession.

Apparently, then, the demurrer is well taken; but counsel for the plaintiff contends that this is not a bill of discovery, and that nothing is sought to be discovered from the defendants in that respect. But it is said, on good authority, that every bill for relief is in reality a bill for discovery, since it asks from the defendant an answer as to all the matters charged therein (Story's Eq. Pl., sec. 311); and by the same authority, an answer must confess, avoid, deny, or traverse all the material parts of the bill. (Id., sec. 852.)

The prayer for the surrender of the plate and printed copies on hand is also demurrable.

The forfeitures and penalties given by section 4965 of the revised statutes (17 Stat. 214) are not enforceable in a court of equity in the absence of an express statute to that effect. To recover the forfeiture and penalties given by this section for the infringement of his copyright, the plaintiff must resort to an action at law. (*Stevens* v. *Cady*, 2 Curt. 200; *Stevens* v. *Gladding*, 17 How. 453.) Admitting this, however, counsel for the plaintiff insists that the surrender of these articles as prayed for is not an enforcement of the forfeiture of them to the plaintiff, but only a means of enforcing the decree for a permanent injunction. No authority is cited for this distinction.

To require the defendants to surrender their plate and copies of map for destruction will effectually enforce the forfeiture as against them, and in favor of the plaintiff so far and in the mode he desires. In fact, upon the delivery of the articles to the officer of this court for the purpose desired, the forfeiture is there and thereby enforced against the defendants—their right in and to the property is divested and it is disposed of with the consent of the plaintiff.

On the argument, counsel for the defendants also assigned, *ore tenus*, as a cause of demurrer to so much of the bill as alleged the amount of damages sustained by the plaintiff on account of the infringement, that damages are not recoverable in a court of equity, and the relief is limited to an account and recovery of the profits made by the defendants on the sale of the infringing map.

This was the rule in patent cases until the passage of the act of July 8, 1870, when by section 55 of that act (16 Stat. 206; sec. 4921 R. S.) it was provided that in a suit of equity, when a decree is given for an infringement, the plaintiff shall be entitled to recover not only profits made by the defendant, but the damages he has sustained thereby. (Curt. Pat., sec. 341; *Williams* v. *Leonard*, 9 Blatch. 476; *Andrews* v. *Cregan*, 7 Fed. Rep. 478.)

But the provisions of the act of July 8, 1870, concerning patents, do not appear to be applicable to copyrights which are provided for separately in the sections from 85 to 110, inclusive. By section 106 jurisdiction is given to the courts

of the United States of suits and actions arising under "the copyright laws of the United States," and power is given them to grant injunctions according to the course and principles of courts of equity—an incident of which is a right to an account of profits. *Stevens* v. *Gladding*, 17 How. 456. But no provision is made, as in section 55, *supra*, concerning cases arising under "the patent laws of the United States" for the recovery of damages as well as profits in a suit in equity. The reason for this distinction between subjects so nearly identical in their nature and origin is not apparent, but the statute has made it and the courts must observe it.

The demurrer is sustained.

UNITED STATES *v.* G. W. LOFTIS.

DISTRICT COURT, DISTRICT OF OREGON.
JULY 11, 1882.

1. WRITING.—A sealed letter deposited in the mail addressed to some one is not a writing or publication within the purview of the first clause of section 3893 of the revised statutes, declaring obscene, etc., books, writings, etc., or "other publication of an indecent character," non-mailable.
2. LETTER.—A sealed letter is not within the prohibition of said section 3893, however indecent or obscene in its contents; but if there is any such delineation or language put upon the envelope containing it, it thereby becomes non-mailable, and the person depositing it in the mail thereby commits a crime.

Before DEADY, District Judge.

James F. Watson, for plaintiff.

George H. Williams and George Durham, for defendant.

DEADY, J. The defendant is accused by the information in this case of "the crime of depositing for mailing and delivery in the post-office of the United States a publication of an indecent character, and a letter containing indecent and scurrilous epithets, contrary to section 3893 of the revised statutes; committed by knowingly mailing at Rainier,

in a sealed envelope, postage paid, and addressed to 'Mr. Joish Way Thayer, Oregon City, Oregon,' a certain obscene and indecent writing and publication," in words and figures as therein set forth.

The defendant demurs to the information because it does not state facts sufficient to constitute a crime, and upon the argument thereof made the point, that however the act of the defendant may be characterized by the general charge in the information, its true character must be ascertained from the particular facts stated therein; and that it appeared therefrom, that the alleged indecent "publication" was only a private, sealed letter and not a publication at all, or anything within the purview of the statute; and it was also suggested in support of the demurrer, that the language contained in the letter, however filthy, was not "obscene, lewd, or lascivious."

The legislation upon this subject, it appears, commenced with section 148 of the postoffice act of July 8, 1872 (17 Stat. 302), which provided, "That no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character, or any letter upon the envelope of which or postal card upon which scurrilous epithets may have been written, or printed, or disloyal devices printed or engraven, shall be carried in the mail." By the act of March 3, 1873 (17 Stat. 599), said section 148 was amended so as to omit the word "vulgar" and all mention of "disloyal devices," and to include "lewd or lascivious" books, etc., as well as "obscene" ones, and a "paper" as well as a "picture or print;" and the word "indecent" was added to the word "scurrilous," in describing the epithets prohibited upon a postal card or the envelope of a letter.

A new clause was also added, prohibiting the transportation in the mails of any "article or thing designed or intended" to prevent conception or procure abortion, or "for any indecent or immoral use or nature," or any communication or notice giving any information where, how, or of whom or by what means any such things may be obtained or made.

This section as thus amended became section 3893 of the

revised statutes, which was again amended by the act of July 12, 1876 (19 Stat. 90), so as to add the word "writing" to the category of non-mailable books, etc., and in regard to such letters and postal cards substituted the following: "and every letter upon the envelope of which or postal card upon which, indecent, obscene, lewd, or lascivious epithets, terms, or language may be written or printed" is hereby declared to be non-mailable matter. The punishment for mailing such matter is a fine not less than one hundred dollars nor more than five thousand dollars or imprisonment at hard labor not less than one nor more than ten years or both.

It is admitted that the language used in this letter is indecent. Indeed it is grossly so. The term is said to signify more than indelicate and less than immodest—to mean something unfit for the eye or ear. (Wor. Dic.) And I think it is obscene also. This latter word has a wide range in both the Latin and English languages. It includes on the one hand what is merely inauspicious, foul, or indecent, and on the other what is immodest and calculated to excite impure emotions or desires. (Wor. Dic.)

It is also admitted that the case made in the information does not come within the clause of the statute directed against letters *eo nomine;* but it is contended by the district attorney that the letter in question is a "writing" within the meaning of that term as used in the first clause of the section, which reads: "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, *writing*, print, or other publication of an indecent character," is declared non-mailable.

Speaking generally, this letter is a writing; but to bring it within this clause of the statute, it must be also a "publication." This word "writing" occurs in an enumeration of things—books, pamphlets, pictures, prints, and papers—which *ex vi termini* are *prima facie* publications.

The general phrase with which the enumeration ends—"or other publication of an indecent character"—impliedly asserts that the things before enumerated are publications.

The expression, "John and James and other men," is one

in which by a necessary implication it is asserted that John and James are men.

A publication is something, as a book or print, which has been published—made public or known to the world. And a writing as well as a printing may be published. What constitutes a publication or a making public may be a question, and must generally depend upon the circumstances of each case. But a private letter sent by one individual to another in a sealed envelope, cannot be considered a "publication" within this statute.

But the fact that the statute has expressly provided for the case of a "letter" in a separate clause, in which the offence that may be committed by means of it is confined to indecent, obscene, etc., language on the envelope in which it is enclosed, is conclusive to my mind, that congress did not intend to include it in the term "writing," as used in the clause concerning obscene publications.

It never was the intention of the law to take cognizance of what passes between individuals in private communications under the sanctity and security of a seal. And probably the chief reason for making it a crime to put indecent or obscene delineations or language on the envelope inclosing such communications is to prevent the post-office from being used as a means for committing cowardly and indecent assaults, at a safe distance or anonymously, upon the feelings and character of any one, by the use of indecent or immoral and offensive epithets and suggestions openly addressed to him on the envelope of a letter or a postal card.

But what is said privately—within the envelope and under the seal—the statute does not notice. It could not well do so without establishing an espionage over private correspondence, which would never be thought of in a free country.

As was said by Mr. Justice Field, in *Ex parte Jackson*, 96 U. S.: "The difficulty attending the subject arises, not from the want of power in congress to prescribe regulations, as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail."

This statute is largely preventive in its character. It defines non-mailable matter by its external appearance when a letter or sealed package, and by its contents when not, and therefore open to inspection by the post-office officials. But if it was intended that it should extend to the contents of a sealed letter, some provision would have been made for a legal examination when there was reason to believe that its contents were obnoxious to the law, and its enforcement not left to the chance complaint of the person to whom it might be addressed.

But as the case stands, it is apparent that the matter to be excluded from the mails, and which is made a crime to deposit therein, is such, that its illegal character is open to inspection and can be ascertained without breaking the seal of private correspondence.

Therefore, in the case of a letter, unless it is non-mailable by reason of something upon the outside of it or the envelope in which it is contained, it is mailable without reference to the character or morality of its contents.

And yet it is quite certain that the public good would be promoted and no private right injured, by including such a case as this within the statute upon the complaint of the party injured, and thereby prevent the mails from being used as a comparatively safe means by one person to annoy and wound the feelings of another by applying to him in a letter indecent and obscene epithets, or accusing him in gross and beastly language of criminal or immoral conduct.

The demurrer is sustained.

SARAH H. HEBERT v. THE MUTUAL LIFE INSURANCE COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.
JULY 19, 1882.

1. EQUITY—SPECIFIC PERFORMANCE OF CONTRACT.—Equity has jurisdiction to enforce the performance of a contract to deliver a policy of insurance; and having taken jurisdiction for that purpose, will, in case there has been a loss or death, retain it for the purpose of decreeing payment of the policy.

2. CERTAINTY.—A contract to issue a plain life insurance policy upon the life of the applicant for fifteen thousand dollars, payable to his wife, according to the form in use by the company, is sufficiently certain to be enforced; and if there is any extrinsic reason why it should not be enforced, as that it was procured by fraud or falsehood, it must be set up as a defence.

Before DEADY, District Judge.

William H. Holmes, for plaintiff.

Thomas N. Strong, for defendant.

DEADY, J. This suit is brought to enforce a contract for the delivery of a life insurance policy for the sum of fifteen thousand dollars, and for a decree that the defendant pay the same to the plaintiff.

The bill alleges that the defendant, on June 11, 1878, and since, was and has been a corporation organized under the laws of New York and doing a life insurance business in Oregon; that on said day Oliver Hebert of Marion county, Oregon, the husband of the plaintiff, applied to the agents of the defendant in said county for insurance upon his life of twenty thousand dollars, payable to the plaintiff, and paid them the first quarter's premium thereon, to wit, one hundred and five dollars and sixty cents, which sum was by them forwarded to the defendant upon the condition "that if the amount of the risk should be reduced a proportionate share of the premium should be refunded," and if the whole application should be rejected it would all be refunded; that subsequently the defendant rejected five thousand dollars of said application, and on August 26, 1878, remitted to said Hebert twenty-six dollars and forty cents of said payment and "accepted, received, and retained" the remaining seventy-nine dollars and forty cents as the premium upon the first quarter of such insurance, and in consideration thereof "did insure the life of said Hebert from such time in the sum of fifteen thousand dollars," payable upon the death of said Hebert to the plaintiff; and also agreed "to issue and deliver unto said Hebert a 'plain life insurance policy' upon his own life according to the customary form adopted and in use by the defendant for said sum payable as aforesaid," which agreement it has hitherto neg-

lected and refused to perform; that about September 8, 1878, at said county, said Hebert died, and the plaintiff thereupon demanded of the defendant said policy and the payment of said insurance, which was refused; and, that by reason of the refusal to issue said policy the plaintiff is unable to "enforce her rights in an action at law," wherefore she brings this suit and prays the defendant may be required to deliver to her "a plain life insurance policy" upon the life of said Hebert for the sum aforesaid, to take effect from the date of the contract aforesaid and payable to the plaintiff, and for a decree against the defendant for said sum of fifteen thousand dollars with interest.

The defendant demurs to the bill, because: 1. The plaintiff upon the case stated is not entitled to the relief prayed for; 2. The policy is not sufficiently described; and, 3. The plaintiff has an adequate remedy at law.

The jurisdiction of a court of equity to compel the specific performance of a contract for insurance is well established. The policy cannot be obtained by an action at law, although one might be maintained upon it for the insurance after it is issued. But a court of equity having taken jurisdiction for the purpose of compelling the delivery of the policy, will retain it where there has been a loss or death for the purpose of decreeing payment of the policy, both to avoid expense and because the latter relief is a mere incident of the former. (Angell on F. and L. Ins., sec. 34; *Perkins* v. *The Washington Ins. Co.*, 4 Cow. 645; *Carpenter* v. *The M. S. Ins. Co.*, 4 Sandf. Ch. 408; *Brigger* v. *S. I. Ins. Co.*, 5 Saw. 304.)

Nor does there appear to be any uncertainty, as to the nature of the contract or the form or effect of the policy, as stated in the bill. The agreement was for "a plain life insurance policy" upon the life of the deceased for fifteen thousand dollars, payable to the plaintiff "according to the customary form adopted and in use by the defendant," for which it was paid and had received one quarter's premium.

If there is any reason not appearing on the face of the bill why the defendant should not be compelled to perform its contract, as that it was procured by fraud or falsehood, the defendant can set it up as a defence.

The demurrer is overruled.

WILLIAM H. FOYE *v.* H. P. NICHOLS ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
JULY 24, 1882.

1. MISNAMING PATENTED DEVICE.—Where the specifications and drawings, as a whole, clearly describe the construction and operation of a machine, the fact that some device in it is called by a wrong name, or a word is not used with strict mathematical accuracy, will not vitiate the patent.
2. AN IMPROVEMENT UPON A PATENTED MACHINE will not prevent the improved machine from being an infringement, if it embraces the invention patented.
3. TWO PLOWS ON A SHAFT.—Where one feature of a patented invention consists in placing two plows on a shaft with their screws running in opposite directions, the one counteracting the strain of the other in the opposite direction when in use, the patent will be infringed by another machine having similar devices on the opposite ends of a shaft jointed in the middle to admit of setting the opposite plows at different angles, for the purpose of adapting it to different characters of soil.
4. USE BY INFRINGER—EVIDENCE OF USEFULNESS.—Where a party embraces and uses in his own machine the invention of another, such use of the patented device is evidence of its usefulness.

Before SAWYER, Circuit Judge.

THE following is so much of the specifications of the plaintiff Foye's patent No. 158,482, dated January 5, 1875, as will be useful without drawings or plates; also, the claims of the patent:

Be it known that I, William H. Foye, of the city and county of San Francisco and State of California, have invented a new and useful rotary plow. * * My invention has for its object to provide a cheap, simple, and efficient rotary plow, capable of adjustment for general use in all varieties of soils, and adapted for operation by horse or steam power, so as to bring it within the reach of small as well as large farmers. It is more especially designed for use in the state of California, and other localities where the soil becomes hard and parched during the dry season, and wet and soft during the rainy season of winter, its construction being such as to lift and turn the soil properly, whether wet or dry, to pulverize it to any required depth,

and at any season of the year. The special advantages in a plow of this capacity are felt in the localities referred to, because, to insure the largest crops, the seed must be sown before the rainy season commences, and this, of course, necessitates the preparation of the land while hard and dry. The summer fallowing, which, in such localities, forms a profitable feature of agriculture, is also best attained by my improved plow, by reason of its adaptation to the preparation of the land at all seasons of the year.

To the accomplishment of the results above referred to, the invention consists, first, in constructing the plow with a series of concavo-convex cutting-blades arranged spirally around a supporting and driving shaft, so that, when the shaft is drawn forward, the convex edges of the blades shall enter the ground with a smooth shearing cut, in contradistinction to a scraping and grinding action, separating and lifting the soil, which is caught by the concave faces, and by them turned and dropped into furrows in rear of the plow; secondly, in adjusting the pitch of the spiral blades upon the shaft, for the purpose of regulating the cut of the blades, and the width of the furrows, in accordance with the character of the ground to be plowed; thirdly, in the provision of means for effecting such adjustment; fourthly, in arranging two sets of concavo-convex blades upon the same shaft, extending outward in opposite directions from the center thereof toward the ends, so as to form right and left spiral cutters, for the purpose of preventing the end or longitudinal draft of the plow when drawn forward through the ground at right angles to the axis of rotation.

In the accompanying drawings, A is the main shaft of the plow, mounted in a suitable frame or support in such a manner as to be operated by steam or horse power. When steam is employed as a motor the plow may be arranged, in any preferred manner, behind a low truck adapted to be driven by a small threshing-engine mounted upon it. B B are the cutting-blades, each constructed in concavo-convex form transversely, and having such a spiral curve as to form one complete coil or circle, more or less. C are collars, mounted upon the shaft at suitable distances apart, and

adapted for adjustment thereon by means of set-screws D. The ends of the blades are abutted against each other upon the collars C, so as to form one continuous spiral cutter around the shaft, as shown in Fig. 1, or to form the right and left spiral cutters, extending in opposite directions from the center of the shaft outward toward the ends thereof, as shown in Fig. 3. * * *

When the plow is in operation it moves forward at right angles to its axis of rotation, with the convex faces of the blades foremost, or against the ground to be plowed. The convex edges, therefore, rotate downward through the ground with a smooth shearing cut, separating the soil in strips, which are thrown back against the concave faces of the blades, and are by them lifted up, slightly turned, and dropped into furrows behind the plow. The lifting and dropping of the soil pulverizes it to a great extent, and prepares it for its subsequent treatment to receive the seed.

The shearing cut separates the soil with the least resistance, and therefore causes the plow to operate with a less expenditure of power than would be required to drive a plow constructed with flat spiral blades or rotary shovels. * * *

In plowing hard dry land the pitch of the screw should be the least, in order to cut narrow strips; but in wet or moist land the pitch should be greater, in order to cut the soil in wider strips.

The cutting-blades may be provided with a curved flange or counter-share, H, along their concave faces when the plow is intended for constant use in wet lands, to prevent the damp soil from running upon and clogging the cutters.

For the purpose of preventing the longitudinal draft of the plow due to the spiral or screw action of the cutters in passing through the ground, I employ the right-and-left arrangment of the cutters, as above described, so that the draft shall be equal from the center to the outer ends of the shaft.

The plow may be made of any convenient length, though, preferably, it should not exceed ten or fifteen feet,

while the blades may be made of any suitable width, varying from one to three feet.

Having thus described my invention, what I claim is—1. A rotary plow consisting of a series of concavo-convex cutting-blades arranged spirally around a supporting and driving shaft, substantially as described, for the purpose specified. 2. The spiral cutting-blades adapted for adjustment upon the shaft, for the purpose of regulating their cut, and the consequent width of the furrows, substantially as described. 3. The combination of the adjustable collars and slotted wedges with the concavo-convex cutting-blades and the main supporting-shaft substantially as described, for the purpose specified. 4. A rotary plow having two sets of concavo-convex blades arranged spirally around the supporting-shaft, so as to extend outward in opposite directions from the center thereof toward the ends, substantially as described, for the purpose specified. 5. The blades of a rotary plow, each made with a spiral curve, and with a concavo-convex form, transversely, substantially as described, for the purpose specified.

The following is from defendant Nichols' patent No. 187,769, dated February 27, 1877:

Be it known that I, William T. Nichols, of Chicago, in the county of Cook and state of Illinois, have invented a new and useful improvement in rotary harrows or scarifiers, which is fully set forth in the following specification, reference being had to the accompanying drawings. * * *

My invention relates to a machine for thoroughly stirring and pulverizing the earth, to prepare it for seeding, by means of rotary scarifiers or pulverizers.

The invention consists in a rotary scarifier composed of a skeleton frame, around which are spirally wound two or more cutting-strips attached to arms projecting from the skeleton frame, and set at an angle to the axis, so as to be dishing. It also consists in the combination of a jointed shaft with two of these rotary scarifiers mounted thereon, whereby their angle to each other may be adjusted. It also consists in the combination of a seeding device with the rotary scarifiers, and special devices for operating the former

by the latter at pleasure; and it further consists in various devices and combinations of devices, as will be hereinafter fully set forth.

In the drawings, A represents a simple frame, to which is attached a tongue, B. From each end of the frame depend hangers *a*, in which is supported a shaft, C. This shaft is made in two parts, the inner ends of which are halved, as shown in figures 4 and 5 of the drawings, and pivoted together, so that the shaft may be moved backward and forward, the bearings in the hangers *a* being sufficiently large to accommodate this movement. An angular-braced hanger, D, is also attached to the lower side of the tongue, the lower end of which is constructed with a recess, *d*, as shown in figure 3 of the drawings, within which is placed the inner ends of the two parts of the shaft C, and through which the bolt passes which unites them. The hanger D is attached to the tongue B by two bolts, one of which, *b*, passes through a slot, d^1, in the hanger, and the other of which, *b'*, is inserted in any one of a series of holes, d^2, in the upper arm of the hanger. Both bolts pass through the tongue, and are provided with screw-nuts for tightening them up.

It is evident that, by means of these devices, the hanger D may be adjusted back and forth on the tongue, thereby adjusting in a similar manner the jointed shaft C. The scarifiers E are constructed of a skeleton cylindrical frame composed of two disks, E', joined together by cross-bars *e*, attached to their edges, each of which are provided with a series of lugs or short arms, *e'*. These lugs or arms *e'* are inclined or set at an angle to the bars *e*, as shown in figures 1 and 9 of the drawings.

Narrow bands or strips of metal F are wound spirally around this skeleton frame. These spiral strips should be two or more in number, and are fastened by rivets to the arms *e'*. The strips F are set with one edge, *f*, projecting outward beyond the arms *e'*. The edge *f* is sharpened or bevelled, and as the arms *e'* are inclined as above described, the strips F attached thereto will stand in a dishing position to the axis of the cylinders, around which they are wound.

The origin of the several spirals is at different points around the cylinder, so that there is always a free space between the end of one spiral and the nearest turn of the next one.

The disks E are perforated to receive the shaft C, on each division of which one of the spiral scarifiers is mounted, the joint in the shaft being between them. It is evident, therefore, that the adjustment of the shaft described above will also adjust the scarifiers, so that they may stand directly in line with each other or at an angle to each other, as may be desired.

On the shaft C are rings or collars G, which are used for the purpose of adjusting the cylinders on the shaft by placing them on one side or the other of said cylinders, according to the position in which it is desired to fix the latter. * * *

In the operation of my apparatus, if the scarifiers E are set directly in line with each other, they will roll over the ground without cutting in and stirring it; but if the joint in the shaft C is brought forward, so that the scarifiers will stand at an angle to each other, the spiral strips will cut into the surface like a screw, and, as they revolve, will raise a portion of the earth and turn it over, the two scarifiers turning the earth inward toward the middle of the machine. In this operation I combine the principle of the screw, the wedge, and the lever, and the surface of the earth is most thoroughly stirred and broken.

By adjusting the shaft C more or less forward, the width of cut made by the spiral strips F may be regulated at pleasure, and by using the collars G, the scarifiers may be arranged close together, or at some distance apart. The shaft C is made of such length that, by bringing all the collars G to the centre of the shaft, between the scarifiers, the machine can be used as a corn cultivator, the width of the scarifiers being adapted to pass between the rows. * * *

Having thus described my invention, what I claim as new and desire to secure by letters patent, is: 1. The cross-bars *e*, provided with inclined lugs or arms *e'*, in combination with the spirally wound metallic strips F, substantially as

and for the purpose set forth. 2. The screw or spiral rotary scarifiers E, in combination with the jointed adjustable shaft C, substantially as and for the purpose set forth. 3. The rotary screw-scarifiers E, in combination with the jointed shaft C, adjustable hanger D, and tongue B, substantially as and for the purpose set forth. 4. The cam I, attached to one end of a revolving scarifier E, in combination with the sliding adjustable rock-shaft K and seeding-slide H, substantially as and for the purpose set forth.

McAllister & Bergin, for complainant.

McClure, Dwinelle & Plaisance, and Coburn & Thacher, for defendants.

SAWYER, Circuit Judge, delivering an oral decision. In the case of *Foye* v. *Nichols* I have reached a conclusion. It is a patent case—a patent plow or pulverizer; one party calls his implement a plow, the other calls his a pulverizer. I am satisfied on an examination that the first, fourth, and fifth claims are infringed; and that the patent is a valid patent as to those claims. I do not think there is any anticipation.

The point most relied upon, is, as to whether the blades of the complainant's plow are concavo-convex "transversely." The argument is on the word "transversely." I think the argument is hypercritical, on the strict mathematical scientific definition of the term "transverse."

The drawings show exactly the form, and the model also, which the defendant himself presents. So that there can be no doubt as to what the party means. The drawing and model give precisely the form, in which the blade when bent on the shaft of the defendant's machine takes, which defendant calls "*dishing*," and the complainant "*concavo-convex.*" The fact that the complainant christens his implement a "plow," and the defendant his a "pulverizer," cannot affect the character or operation of either machine, as shown by the models and drawings which constitute important parts of the description. So whether the term "concavo-convex transversely" describes the complainant's

blades with strict mathematical or scientific precision and accuracy, cannot affect the character or operation of the implement, as shown in the models and drawings. The whole taken together shows what his meaning is.

The defendant does not make his blades quite so wide as the complainant suggests, but the blade performs the same service, in substantially, nay, precisely the same way. I do not think there can be any misunderstanding as to what the complainant means by his description, that is to say, the description of the implement and its operation in the specifications and drawings. There can be no doubt that the defendant's blade performs the same operation in precisely the same way. There was some criticism on the single shaft of complainant, and on the draft at right angles to the axis of motion. But defendant's two plows or pulverizers, whatever they may be called, are on a single shaft —jointed, it is true, but still a single shaft. There is in his machine a contrivance by which he can set his opposite plows absolutely at right angles, or at any desired inclination, in order to accommodate itself to the different varieties of soil. This may possibly be an improvement, but if so, he still uses the two plows on opposite ends of the shaft, with their screws running in opposite directions, the one counteracting the strain of the other in the opposite direction. He embraces the complainant's invention, and even if the complainant's plows on the opposite ends of the shaft are set at an angle, the draft would be at right angles to the general line of the axis of revolution of the entire machine.

The other point that was very strenuously argued and dwelt upon, was as to whether the complainant's invention is useful or not. It was contended, that the evidence is insufficient to show its usefulness. If we concede for the purpose of the argument that the complainant's own testimony on the question of usefulness, left it in doubt, it is still one of those cases which so frequently arise, where the defendant uses the precise features of the prior machine, and still insists that they are not useful; and in this case his machine manifestly depends on those elements. In fact, t is all there is, of the defendant's machine, so far as its

operation as a plow or pulverizer is concerned, and the several features used are separately claimed in plaintiff's patent.

He testified that his machine is useful—by far the most useful machine for the purposes intended, in existence. If, then, the several features, or inventions, separately claimed by the complainant are useful in the defendant's machine, they must be useful in the other. Without those features covered by the several claims sustained, there would be no machine of the defendant.

Defendant's patent does not cover those features, and for the reason that they are anticipated by Foye. It only covers those features in combination with some other minor features. It certainly embraces the features of the complainant's machine, and they are the operative elements of defendant's machine, without which, his machine manifestly would not work well.

The complainant claims the several sub-features or combinations separately, and all are used in defendant's machine, which is admitted to be useful. That is ample evidence of their usefulness. Those are the main points on which the contest arises, and on which the argument was expended. I think that the patent is a valid one, as to these three claims, the first, fourth, and fifth; and the defendant's machine infringes each of those three claims.

There must be a decree for the complainant, with reference to those claims, and it must be referred to the standing master, to ascertain the profits.

It is so ordered.

THE DEVONSHIRE — GEORGE MARSHAL ET AL., CLAIMANTS.

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 28, 1882.

1. BERTHS ON STEAM VESSELS.—The provisions of section 2 of the act of March 3, 1855 (10 Stat. 716, sec. 4255 of the R. S.), relating to the construction and occupation of berths on vessels carrying passengers from foreign ports to the United States, are not deemed applicable to steam vessels.

2. RE-ENACTMENT OF STATUTE—FORMER CONSTRUCTION OF IT.—Where a statute has received a judicial construction and is afterwards re-enacted by the legislature of the same or another country, it is presumed to have been passed as construed.

Before DEADY, District Judge.

James P. Watson, for the United States.

John W. Whalley, for claimants.

DEADY, J. This is a suit *in rem*, brought by the United States to enforce a lien against the British steamship, *Devonshire*, for four thousand one hundred and thirty dollars of penalties, alleged to have been incurred by the master and owners by violation of section 2 of the act of March 3, 1855 (10 Stat. 716; sec. 4255 R. S.), entitled, "An act to regulate the carriage of passengers in steamships and other vessels."

The libel alleges that on June 12, 1882, the said steamship, at the port of Hongkong, China, took on board eight hundred and twenty-six passengers, and on July 7, 1882, brought the same to the port of Astoria, and within the jurisdiction of the United States and this court; that the berths used by the passengers on said voyage were not constructed parallel with the sides of the vessel or separated by partitions, or two feet in width as required by said section 4255 of the revised statutes, and were occupied by more than one passenger contrary thereto, whereby said master and owner of said steamship, severally, became liable to pay to the United States a penalty of five dollars for each of said passengers, and that the libellant has a lien upon said steamship for the amount thereof.

The claimants except to the libel, and allege that the *Devonshire* is a steamship, and the passengers in question were steerage passengers, and therefore said section 4255 of the revised statutes upon which the libel is founded, does not apply to her, and pray that the libel may be dismissed.

The first section of this act (secs. 4252–4 of the R. S.) provides that "no master of any vessel," foreign or domestic, shall take on at any foreign port in a territory not contiguous to the United States with intent to bring thereto, a greater

number of passengers than in the proportion of one to every two tons of said vessel, and that "the spaces appropriated for the use of said passengers and which shall not be occupied by stores or other goods, not the personal baggage of such passengers," shall be in a certain specified proportion to the whole number of passengers allotted to such space.

The second section (4255 of the R. S.) provides that "no *such* vessel shall have more than two tiers of berths;" and prescribes "the interval between the lowest part thereof and the deck or platform;" and that "the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions;" and be of a certain length and width, and each only occupied by one passenger; with a provision for double berths to be occupied by more then one person under certain circumstances and restrictions. For any violation of this section, it is declared that the master of the vessel and the owners thereof shall severally be liable to a penalty of five dollars for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port when such vessel may arrive or depart."

The fifteenth section (sec. 4270 of the R. S.) declares that "the amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens on the vessel violating those provisions; and such vessel shall be libelled therefor in any district or circuit court of the United States where such vessel shall arrive."

Each of these sections uses the word "vessel" without in any way limiting its application to a sail vessel. Standing alone and without qualification, they would include in their provisions a steam as well as a sail vessel. A vessel is none the less one on account of the manner of her propulsion, whether by oars, sails, or steam. And the revised statutes (sec. 3) declare that the term "includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water."

But the tenth section of the act of March 3, 1855, *supra*, provided that "the provisions, requisitions, penalties, and

liens of this act relating to the *space* in vessels appropriated to the use of passengers are hereby extended and made applicable to all places appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this act named, and to such vessels and the masters thereof;" and repeals so much of the steamboat act of August 30, 1850 (10 Stat. 61), as conflicts therewith; and further provides that "the space appropriated to the use of steerage passengers" on steam vessels, shall be "subject to the supervision and inspection of the collector of customs" as provided in section 9 of the act, in the case of other vessels.

In January, 1868, this statute came before the district court for the southern district of New York, for construction, in the case of the steamship *Manhattan* (2 Ben. 88), which was libelled on account of penalties alleged to have been incurred by the master and owner in the violation of this same section 2.

Judge Blatchford held that the section was not applicable to steamships upon the familiar rule, that the statute must be so construed as to give effect to every significant clause, sentence, or word in it (Smith's Com., sec. 575); and, if the provisions of the second section extended to steam vessels *proprio vigore*, notwithstanding the tenth section, then the provisions of the first section do also, and the tenth is altogether useless and nugatory. This decision was affirmed on appeal to the circuit court, and the judge who made it has since been placed on the supreme bench. No other decision upon the act has been cited or come to my knowledge.

In the revision of the statutes, this section 10 was omitted, and the whole act left applicable to steam vessels. But afterwards it was re-enacted as an amendment to section 4264 of the revised statutes, by the act of February 27, 1877 (19 Stat. 250), "to perfect the revision of the statutes of the United States," etc. By reason of this amendment the statute now stands as when the second section was construed in the case of the *Manhattan*, not to be applicable to steam

vessels, with this additional and material circumstances in favor of such construction, namely: that congress by the deliberate replacement of section 10, have not only declared it shall have effect as a part of the statute, but presumably that it shall have such effect according to the then known construction given to it in that case. (*Pennoch* v. *Dialogue*, 2 Pet. 18; *Kirkpatrick* v. *Gibson's Executors*, 2 Brock. 391; *Commonwealth* v. *Hartnett*, 3 Gray, 451; *Cathcart* v. *Robinson*, 5 Pet. 279.)

The argument of the district attorney in favor of the libel is, that the provisions in section 2 are regulations relating to the "space" appropriated to passengers, and therefore made applicable to steam vessels by the operation of section 10, because, by them the "space" between each berth and that appropriated to each passenger therein is prescribed. And when we consider that the evils intended to be prevented by section 2 are as likely to exist in the case of steerage passengers carried in steamships as those against which section 1 is intended to guard, it is not without force.

There is quite as much need that a steerage passenger shall have the "space" and privacy provided in section 2, when he lies down to sleep or is prostrated with sickness, as that he shall have the general moving and breathing "space" between decks provided in section 1. And although the word "space" is not used in section 2, still that is the subject of it, and its division and appropriation among the passengers, for the purpose of berths, are thereby carefully and minutely regulated.

But, in the light of the decision in the case of the *Manhattan*, and particularly the unqualified re-enactment by congress of section 10 in 1877, after the construction there given to it, in 1868, I do not feel at liberty to hold otherwise. The exception is sustained and the libel dismissed.

And it may not be amiss to remark that this conclusion is not in conflict with what may be called the justice of the case. These Chinese immigrants are all males, and generally adults, and there is very little need in their case for the division of berths, as required by said section 2. This

regulation was made to meet the case of European immigrants, consisting of both sexes, married and unmarried.

It is not pretended that any particular harm or inconvenience has resulted from the want of a division of berths in this case, and the enforcement of the law, even if it were applicable, would be more for the punishment of the shipper than for the protection of the immigrant.

CHARLOTTE HAYNER *v.* JOHN A. STANLY ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
JULY 31, 1882.

1. RES ADJUDICATA.—Prior to the acquisition of California by the United States, the Mexican government granted a tract of land therein to one H. In 1857, S., claiming to be the owner of a part of the land so granted under title derived from H. (the claim for which part had been confirmed to the grantor of S., but no patent therefor issued), commenced an action of ejectment against G. and others, who were in possession of the lands, also claiming to own the same under title derived from H., and who had also obtained a confirmation of their claim to the premises, but no patent. On the trial of the action the principal question litigated was whether the premises in controversy had been conveyed by a deed made by H. to one F. under whom S. claimed, and it was determined that said deed did convey the lands, and judgment was rendered in favor of S. On appeal to the state supreme court this judgment was affirmed. Pending the litigation a patent for the lands was issued to the grantor of S., and some twenty years later, patents were issued to G. *et al.*, for the same lands. The grantees of G. *et al.*, after the issue of the latter patents brought ejectment against the grantee of S. for the lands, and on the trial of that action offered to prove that the premises in controversy were not within the premises conveyed by the deed from H. to F. *Held*—that by the trial and judgment in the former action, that point was determined in favor of S. and became *res adjudicata*, and the grantee of G. *et al.* was estopped from again litigating the question as against S. or his grantee, and that the issue of the patents on the claims of G. *et al.* did not, as to the question so determined, create any new title or right to again litigate the question determined by the former judgment, and that such question is not open to further litigation.
2. PATENT—LEGAL TITLE.—M., a claimant under title derived from the original grantee of a part of the lands embraced in a Mexican grant, obtained a decree of confirmation on which a patent was issued, and other

claimants of the same land under title also claimed to have been derived from the same original grantee, and whose claim had been confirmed prior to the issue of the patent to M., obtained patents for the same land some years subsequent to the issue of the patent to M. *Held:* 1. That the issue of the patent to M. vested the entire legal title in him, and left nothing in the United States upon which the subsequent patents could operate, and consequently nothing passed by them. With the issue and delivery of the senior patent, all authority or control of the executive department over the land passed away. 2. That under such circumstances in an action at law the senior patent is conclusive as to the title, and cannot be assailed collaterally by the holders of the junior patent. 3. The only remedy of the junior patentees is in equity to charge the holder of the senior patent, if there are equitable grounds for so doing, with a trust for their benefit. 4. While in a proper sense it may be true that in acting on a claim for land based on a Mexican grant, the United States has no interest in the derivative title from the original grantee of the Mexican government, yet where one held such a derivative title prior to the transfer of California to the United States, he was one of the parties protected by the stipulations of the treaty, and it would seem was as much entitled to have his deed from the original grantee passed upon, as he was to have the original grant itself passed upon. 5. The cases in which it has been held admissible in an action at law between the holders of senior and junior patents for the same land, to examine into the equities for the purpose of attaching a prior equity to the junior patent, are all cases where the parties have sought to acquire lands belonging to the United States *upon different and independent adverse claims*, and have no application to a case where both parties claim under the same original grant or right, though by different derivative titles. 6. Where two parties claim the same land under different derivative titles from the original grantee of the Mexican government, and one of them obtains a patent for the lands, the right, if any, of the other to relief in equity accrues on the day the patent issues. The cause of suit is full, complete, and perfect on that day, and is not dependent, and cannot rest, upon any subsequent proceeding or patent. *Semble:* Where such equitable action is not commenced until a time when by the state statute of limitations it would be barred, the United States circuit court, although a court of equity, and not absolutely bound by that statute, may in analogy thereto, hold the cause to be stale, and decline on that ground to sustain a bill. *The question* whether a patent gives a new cause of action so as to avoid the statute of limitations, where both parties claim under the same grant, *not determined*.

Before SAWYER, Circuit Judge.

THE facts are stated in the opinion.

B. S. Brooks and Wm. Levision, for plaintiff.

Stanly, Stoney & Hayes, Delos Lake, and John Garber, for defendant.

SAWYER, Circuit Judge. The governor of California in 1836 granted to Nicholas Higuera a tract of land called "Entre Napa." On November 13, 1847, before the transfer of California to the United States, said Higuera and wife conveyed to Mateo Fallon a part of said land described (as translated from the Spanish language in which the conveyance was written) as "a certain quantity of land lying, being, and situate in the district of Sonoma, and territory of Upper California in the valley of Napa, containing more or less, one square mile of land in the place known as the *Rincon de los Carneros*, commencing at the wagon road and ending at a point of the hill on the east." Said Fallon conveyed the same land to Julius Martin, July 1, 1850.

Martin filed his petition for the confirmation of the grant, and his claim to the land so conveyed to him with the board of land commissioners under the act of 1851, on September 4, 1852. His claim was confirmed September 7, 1856; and, upon such decree of confirmation, a patent of the United States was issued to him April 3, 1858, which patent embraced the lands in controversy. The title of said Fallon and Martin became vested in Edward Stanly prior to December, 1857.

On February 7, 1852, Nicholas Higuera conveyed to one Riva, the lands granted to him as before stated *excepting from the conveyance all lands previously sold and conveyed.*

On February 11, 1853, Marta Frias de Higuera, deriving title under said grant, through said Riva, presented a petition to the board of land commissioners for a confirmation of a claim to a portion of said land so granted to Higuera, which claim was confirmed February 13, 1857, and a patent issued in pursuance of said confirmation on November 4, 1879, which patent embraces a portion of the lands in question.

On February 13, 1853, and July 12, 1854, Joseph Green, deriving title under said grant through said Riva, presented his petition to said board for confirmation of a claim to a

portion of said lands granted to Higuera, which claim was confirmed on February 11, 1857, and, in pursuance of said decree of confirmation, a patent was issued to said Green April 7, 1881, which patent embraces a portion of the land in controversy. On March 3, 1853, Edward Wilson, deriving title from said Riva under said grant, also presented a petition to said Board for a confirmation of a claim to a portion of said land; which claim was confirmed March 20, 1857, and a patent in pursuance of said decree of confirmation was issued to said Wilson, on April 8, 1881; which patent also embraces a portion of the land in controversy. Eleven twelfths of whatever title accrued, respectively, to said Marta Frias, Joseph Green, and Edward Wilson by virtue of said grant to said Higuera, and of said several conveyances from Higuera to Riva, and from said Riva, and from said proceedings and several patents, became vested in the plaintiff prior to the commencement of this action.

On December 14, 1857, said Edward Stanly, who had before that date acquired the title of said Fallon and Martin, commenced an action in the district court of the county of Napa, against said Marta Frias, Joseph Green, and others, all being the parties under whom plaintiff derives title through said several conveyances, to recover all the same lands now in controversy. The plaintiff, Stanly, alleged title to the lands. The defendants denied the title of plaintiff, and upon trial of the issues formed, the facts were found for the plaintiff, and judgment for the recovery of the land thereupon rendered for the plaintiff; and under said judgment the plaintiff was put in possession on March 30, 1859; from which time the said Edward Stanly and the defendant in this action, John A. Stanly, who derives title from said Edward, have been in exclusive adverse possession till the present time. The main question litigated, and upon which the case turned, was as to what land was embraced in said deed from Higuera to Fallon—whether it embraced the land now in controversy. And it was decided that it did. Upon the foregoing facts appearing in the testimony, the plaintiff offered to prove what part of the land granted to Higuera was known as the "Rincon de los Carneros," for

the purpose of showing that the land confirmed to Martin and patented to him, as being the land conveyed by Higuera to Fallon, and from Fallon to Martin, was erroneously located in the patent, and is not the land described in said deeds of conveyance. The questions, therefore, arise: 1. Whether the point is *res adjudicata* in the said action of *Stanly* v. *Green and others*, and on that ground not open to further examination? 2. Whether the patent to Martin is not conclusive upon the defendants in an action at law?

In my judgment both must be answered in the affirmative. At the date of the commencement of said action by *Stanly* v. *Green et al.*, neither patent had been issued, and the parties stood upon an equal footing as to the derivative title from Higuera, the grant to Higuera under which both parties claimed being admitted. The parties to the present action are the same, or in privity with the parties to the former action. The pleadings as to title are substantially the same in both actions, except that the parties have changed sides. The issues are substantially the same in matter and form. In the former case, as appears from the record, and a decision of the supreme court in evidence reported in 12 Cal. 159, the main question in issue fully litigated and determined, was, as to what land was conveyed by Higuera to Fallon by the deed mentioned. It is precisely the same point which the plaintiff now seeks to contest by the evidence offered, and the evidence is precisely of the same kind and character as that introduced upon the same point in the former action. The defendant has fully and aptly pleaded the matter put in issue, litigated, and determined in the former action by way of estoppel, and is in a position to fully avail himself of that defense. In my judgment the former determination is conclusive within the rule as established by the great mass of authorities, and even within the narrowest generally recognized limits of the rule. The deed from Higuera to Fallon was the title upon which the plaintiff relied to recover.

Of necessity, the court was obliged to determine whether it embraced the lands in controversy, or not; and it was determined that it did; that determination and the judgment

resting upon it, were affirmed by the supreme court. That was the issue in fact litigated and adjudged. If the title under, and the effect of that deed, were not directly in issue and determined in such sense, as to be available as an estoppel against further litigation, it would be difficult to determine what the limitation of the rule is. I think the case clearly within the principle applied in *Caperton* v. *Schmidt*, 26 Cal. 479, 501. And certainly within the case of *Marshall* v. *Shafter*, 32 Cal. 176, wherein my views are fully expressed in the concurring opinion (p. 199). The former adjudication is, also, conclusive under the decisions of the supreme court of the United States. (*Miles* v. *Caldwell*, 2 Wall. 38; *Sturdy* v. *Jackaway*, 4 Id. 176; *Blanchard* v. *Brown*, 3 Id. 249; *Campbell* v. *Rankin*, 99 U. S. 263; *Cromwell* v. *County of Sacramento*, 94 Id. 351.)

For the purpose of avoiding the effect of the former adjudication as an estoppel, it is insisted that the condition of the parties has changed since the trial of the former case, and that plaintiff in this case has acquired a new and different title from that litigated by her grantors, which is not affected by the matters before adjudged. But there is no change in title that in any respect affects the questions before litigated and determined. The case is not like any of those cited. There is now, as there was before, no dispute as to boundaries of two opposing Mexican grants. There was but one grant, under which both claim. There is now, and there was then, no dispute affecting the question as to the boundaries of the Mexican grant under which both claim. The same Mexican grant as confirmed in parts to the grantors of both parties, covers the same land.

The question arises on the derivative title under the original grantee. The question is, which party acquired the title of Higuera under his grant, to particular portions of the land; and this is the precise question which was litigated in the former suit. There is no change whatever of title, of circumstances or rights with reference to this particular question. The change in the circumstances does not avoid the point before determined.

In view of the fact that nearly a quarter of a century has

elapsed since the former trial, and that several of the actors in the transactions, and witnesses on the trial in that case are dead, the conditions for attaining a correct determination of the question at issue were far more favorable then, than it is possible for them to be now. It would seem that this is a fit case, if ever there was one, for applying the rule of *res adjudicata*.

In my judgment the point has been conclusively adjudged, and it is not open to further examination.

I, also, think the patent to Martin, under which defendant claims, unassailable in an action at law. In *Beard* v. *Federy*, the supreme court of the United States, following a long and unbroken line of decisions in the supreme court of California, declared the effect of a patent issued upon a Mexican grant confirmed in pursuance of the act of Congress of 1851. The court says: "In the first place, the patent is a deed of the United States. *As a deed*, its operation is that of a *quitclaim*, or rather of a conveyance of *such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners*."

"In the second place the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. * * *

"This instrument is the record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent." (3 Wall. 492; see also, 18 Cal. 26; Id. 570, 571; 20 Id. 412, and many others in the California reports.) A great majority of Mexican grants, among which was that to Higuera, were inchoate, the legal title never having passed to or become perfected in the

grantees. Upon the transfer of California to the United States, the legal title to such lands, subject to the equitable rights of the grantees to have their titles perfected, passed to the United States. The proceeding provided for in the act of 1851, establishing the board of land commissioners, was the mode provided in pursuance of the provisions of the treaty for ascertaining who had grants of land, or equitable claims entitling them to recognition, and to have their grants or titles perfected. The effect of the patent issued in pursuance of the proceedings provided for in its first character as a deed or conveyance, as held in the cases cited, is to pass the legal title in the United States at the date of the filing of the petition to the patentee. The petition of Martin and all proceedings under it, are regular upon their face, and the patent issued therefor under said decree vested the entire legal title, whether rightfully or wrongfully, in Martin. His petition was first filed; his confirmation was first; and his patent is long prior in point of time to either of those under which plaintiff claims. Before either of the patents under which plaintiff claims had been issued, the grant under which the defendant claims had been confirmed, and the title to the land had been legally conveyed to the defendant's grantor. There was nothing left in the United States upon which the subsequent patents could operate.

In the language of Mr. Justice Field, in *Patterson* v. *Tatum*, 3 Saw. 172, wherein both parties had patents, "A patent is the instrument by which the government, whether state or national, passes its title; it is the government conveyance." But if the government possesses at the time no title, none passes by its execution. It is of itself evidence of title only, because government being the original source of title, the presumption of law is, that the title remained with the government until some other disposition of it is shown. But, if an earlier patent is produced, the subsequent one ceases to have any operation. The title passing by the first conveyance is not affected by the second, until the first is got out of the way. If the first was issued from improper motives, corrupt actions, erroneous views of duty, or mistaken

considerations, as to matter of fact, or law, by the officers of the government to whom the execution and issue of patents is intrusted, a court of law can afford no remedy to the second patentee; he must resort to a court of equity for relief. So, also, if particular facts respecting the condition, or location of the property, must be previously ascertained and determined by a special tribunal appointed for that purpose, and that tribunal has come to erroneous conclusions upon which the patent has issued, such conclusions cannot be questioned collaterally, and the patent be thereby invalidated in the action of ejectment. Relief in such cases can only be afforded by a direct proceeding by bill, information, or *scire facias*, either to revoke the first patent, or to restrain its operation, or to subject, where equitable grounds exist, the land to certain trusts in the first patentee's hands. A court of law in an action of ejectment cannot listen to any objections founded upon such considerations. But where the action of the officers in the execution and issue of the patent, or the correctness of the conclusions of the special tribunal is not assailed, but the objection to the patent reaches beyond such action and conclusions, and goes to the existence of a subject upon which such officers or tribunal could act, that is, to the title in the grantor, no such difficulty exists in its consideration in a court of law. That tribunal is fully competent to pass upon the question whether a title existed at the time in the government, as it would be whether the title existed in an individual, where the grantor is a private party."

This language covers the case at bar in all particulars. The title passed to Martin by the first patent, and there was nothing left upon which the second patent could operate. Conceding for the purposes of the argument, that the patent was erroneously given to Martin, when it ought to have gone to the subsequent claimants and patentees, the title, nevertheless, passed; and the only remedy of the injured parties is in equity to charge Martin and his grantors, if there are equitable grounds for so doing, with a trust for their benefit. The legal title is in Martin, and that must control in ejectment. The case of *Moore* v. *Robbins*, 96 U. S. 533, fully

sustains this view. The Court says: "While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear, that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the executive department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the president, is delivered to and accepted by the party, the *title of the government passes with this delivery*. With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed.

"It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul, the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course. 'A patent,' says the court in *United States* v. *Stone* (2 Wall. 525), 'is the highest evidence of title, and is conclusive as against the government and all

claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias;* but a bill in chancery is found a more convenient remedy.' See also *Hughes* v. *United States*, 4 Wall. 232; S. C., 11 How. 552. If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him. But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance generally called a patent, has been signed by the president, and sealed and delivered to, and accepted by the grantee."

These observations apply with still greater force to patents issued by the same department in pursuance of the judicial proceedings had before the board of land commissioners, and the courts on appeal from its decisions under the act of 1851. The patent regularly issued to Martin, after a full investigation by a board and courts provided for the purpose, and having jurisdiction. In *U. S.* v. *Morillo*, 1 Wall. 707, it was assumed, though not expressly decided, that when a grant has been once confirmed to one party and patented, the power of the board and court as to the land so patented is under the *same grant* exhausted. The case of *Adam* v. *Norris*, 103 U. S. 591, has no application.

It has been sometimes somewhat loosely said, that the United States has no interest in the *derivative* titles, except to ascertain that it has a party before it apparently entitled to be heard. This may be true in a proper sense as to the derivative titles first originating since the acquisition of California. But in this case Fallon acquired his title from Higuera before the transfer of California, so that under his derivative title held at the date of that treaty, he was one of the parties protected by the stipulations of the treaty, and as the claimant of the property, it would seem that

he was as much entitled to have his deed from Higuera to him passed upon, as the grant from the government to Higuera. In no other way could he be protected; and Martin stood in his shoes, as he acquired his rights. The plaintiffs' *derivative* title originated after the date of the treaty. But, however this may be, it was necessary for the board to determine the question, whether Martin was entitled to a confirmation and patent of a portion of this particular grant, and if so, of what portion, and that being determined in his favor, and the patent having issued, the legal title under that grant to the part embraced in the patent became perfected in him, and it is unassailable at law, by a party receiving a subsequent patent to the same part under the same grant.

In opposition to this view, many cases are cited from the United States supreme and other courts, to show that it is admissible in an action at law to examine into the equities for the purpose of annexing a prior equity to a junior patent from the same source, and giving it effect as against the prior patent. But none of them are like this case. They are all cases where different parties have sought to acquire lands belonging to the United States upon different, and independent adverse claims, and courses of proceedings, and the court has inquired into the origin of the right, which has ripened into a patent, and regarded the patent as taking effect by relation from the date, when that right first attached.

The prior act by which the right to a patent, as against the government, vested, is regarded as a part of the title. This is very well illustrated by the court in the case of *Bagnell* v. *Broderick*, 13 Pet. 451, one of the class of cases, and one of the cases cited. The court says in distinguishing a prior case: "In that case [*Ross* v. *Borland*, 1 Pet. 662], there were conflicting patents; the younger being founded on an appropriation of the specific land by an entry in the land office of earlier date than the senior patent. The court held that the *entry and junior patent* could be given in evidence *in connection as one title*, so as to overreach the elder patent." (Id. 450, 451.) This case is, upon the whole, favor-

able to the defendants. The entry in the land office is the purchase of the land from the government. Upon a proper entry the land becomes the property of the party making the entry. (*People* v. *Shearer*, 30 Cal. 648; *Witherspoon* v. *Duncan*, 4 Wall. 218; 2 Saw. 455.) Often the patent does not issue for years after the entry. But when it does issue, it attaches itself to the entry, and the patent is regarded as taking effect by relation as of the date of the entry, and in that way overreaches the elder patent issued upon a younger entry. (*Gibson* v. *Choteau*, 13 Wall. 100–102.) Some of these cases are also put upon the ground that the laws of the state in which they arose abolish all distinctions between law and equity proceedings, and all questions may be examined in the same case. In the cases arising under Mexican grants cited, there are always two grants, and the contest is between them. In those cases the patent also *operates in its other aspect*, recognized in the cases before cited, as a record of the government of its action and determination adjudging the grant to be valid and fixing its location, in which character it relates to, and takes effect, not from the filing of the petition merely, as in the aspect of a deed of conveyance, but *from the date of the grant.* Such was the case of *Henshaw* v. *Bissell*, cited from 18 Wall. and 1 Saw. In this case there is nothing to go back to by relation. There was but one Mexican grant, under which both parties claim by derivative title, the defence on derivative title accruing before the acquisition of the country, which was, therefore, as much within the protection of the treaty as the original grant. But defendant's conveyance was first in time; his petition first filed; his confirmation first had, and his patent first issued. His derivative title was properly examined by a board and courts having jurisdiction, and whose duty it was, under the treaty, to protect this grantee's interest; and his patent issued in the proceeding being regular on its face and first in time upon all points, in any view that may be taken, carried with it the legal title. There is nothing in the plaintiff's case to which his patent can go back by relation so as to overreach defendant's title, which must prevail at law. In my judgment, this case is not within

any case, or the principle of any case, cited by plaintiff's counsel.

It is said that the construction of the deed to Fallon is purely a matter of legal cognizance, and, therefore, is open to consideration in this case. This was, doubtless, so in the former action, when neither party had secured the legal title; and the whole case depended upon the construction of that deed. But the inquiry now is, not which party ought in fact and in law to have received the title, but which party in fact and in law has acquired the title; and the determination of that question rests wholly upon the patents. They go back to the United States, the source of title, and the defendant has the elder patent, regularly issued in pursuance of the law.

It is, also, in my view highly proper under the circumstances, and after so long a lapse of time, that the remedy should be in equity. There may be, and probably are, many equities on the side of the defendant, which could and would be considered by a court of equity, but which would be wholly unavailable at law. The defendant's patent issued more than twenty-four years ago, and more than twenty-three years before the commencement of this action. If plaintiff has any equitable grounds upon which she is entitled to a decree controlling the title now in defendant for her own use, her right, or the right of her grantors, to relief accrued on the day the patent issued. The cause of suit was as full, complete, and perfect on that day as it is now. Her equitable right in no respect rests upon any of the subsequent proceedings, or the patents issued on them under which she claims. Her equities antedate all those proceedings, and rest on the defects in the deed to Fallon, by which that deed fails to cover the land in controversy, if any such defect there be; and the trust to hold the title for the benefit of plaintiff or her grantors arose and became fully vested upon the issue of the patent to defendant's grantor.

That cause of suit in the state courts under the state statute of limitations would have been barred in four years at the longest and would have been barred nearly six times over before the commencement of this action. The United

States circuit court, although as a court of equity, may not be absolutely bound by the state statute of limitations, might very well, in analogy to the statute, hold the cause to be stale, and decline to entertain a bill on that ground. Yet, if the same questions can be examined in the action at law upon the patents recently issued, which are held to give a new cause of action, it may be that neither the staleness of the equities, nor the statute of limitations would be available defenses, notwithstanding the fact that there is no change in the *status* of the parties *with reference to the particular grounds of recovery relied on.* And such, also, would have been the case, if plaintiff had waited fifty years more before procuring to be issued, the patents under which she claims. The principle that a new cause of action arises upon the issue of a patent in this class of cases ought not, in my judgment, to be extended. But it is unnecessary now to decide whether a patent gives a new cause of action, so as to avoid the statute, when both parties claim under the same grant. Again, upon looking into the record and opinion of the supreme court in evidence, it appears that on the former trial testimony was given showing that before the purchase either by Martin or Fallon, and before any rights had accrued to the plaintiff's grantors, Higuera pointed out at various times to Fallon, Martin, and others, the lands in controversy as the lands intended to be conveyed, and as the lands in fact conveyed, upon which pointing out and representations the parties doubtless relied in making their several purchases.

A court of equity might take into consideration these and other equities, if any there be, which might be less available in an action at law. There might also be a case for the proper application of the maxim of "where the equities are equal the position of the possessor is best," or of other equitable maxims. So, also, several of the persons who appear to have been witnesses for defendant's grantor, it is well known as a public historical fact, were among the prominent historical characters of the early days of California, and may now be, and, in fact, are generally known to be dead. These are some of the manifest disadvantages

under which defendant must labor if the matters in contest are examinable at law at this late period of time.

The ends of justice are much more likely to be subserved by referring cases of this character to courts of equity, where they exclusively, and properly belong.

The testimony offered, I think inadmissible on both grounds discussed; and the objection to its introduction is sustained.

A. M. SIMPSON v. J. D. SPRECKELS ET AL.

DISTRICT COURT, DISTRICT OF CALIFORNIA.
AUGUST 7, 1882.

1. COLLISION.—Damages decreed against a vessel overtaking another vessel for not keeping out of her way.

Before HOFFMAN, District Judge.

James C. Perkins, for libellants.

C. Temple Emmet and James Wheeler, for Respondents.

HOFFMAN, J. At about six A. M. on the sixth day of March, 1881, the steam-tug *Hercules* took in tow the libellant's brig *Rival* and the respondent's schooner *Rosario*, and proceeded to sea.

The schooner *Rosario* was dropped at or near the nine-fathom buoy, and the brig *Rival* about one mile and a half further out, or to the south-west. At this time, about eight o'clock A. M. of the same day, a strong ebb tide was running to the south-west and a heavy swell setting in from the south-west. The wind was light and variable from the south-east or south-south-east. The *Rosario* was heavily laden and deep in the water. The *Rival* was light. The influence of the tide was therefore most strongly felt by the *Rosario*, while that of the south-west swell operated most strongly on the *Rival*.

The course made or attempted to be made by the *Rosario* was west by south, while that of the *Rival* was about west-

north-west. But the wind was too light to afford perfect steerage way to either vessel. And for some time before the collision there appears to have been no wind. At about the moment of the collision a puff of wind sprung up from the south-west. Whether this occurred before or after the vessels struck is disputed. About ten o'clock A. M. the vessels collided. The port cat-head of the *Rosario* struck the *Rival* on the starboard side of the stern-post. Recoiling, she again struck her bow directly upon the stern-post of the *Rival*. Again recoiling, she struck the *Rival* on the port side of the stern-post, and rubbed along the port side of the latter until the bows of the two vessels came together, when they swung clear of each other. The vessels were in full view of each other from the time of starting until the collision.

The foregoing narrative is derived from the answer of the respondents and from the statement of "undisputed facts" contained in the written brief of their advocate.

It is, I think, apparent that both vessels were sailing or perhaps drifting in the same general direction, and the *Rosario* drawing more water than the *Rival*, and therefore more influenced by the current and less by the swell, gradually overtook the *Rival*, on whom these forces acted with a reversed effect. The *Rosario* was therefore clearly within the rule which requires every vessel overtaking another vessel to keep out of the way of the last-mentioned vessel. (Art. 17, Rules 1864; Section 4233, Revised Statutes U. S., Rule 22.) And the burden of proof in case of accident is on her to show diligence on her own part and negligence on the part of the other vessel. (*The Governor*, Ab. Adm. 108.)

It is not only her duty to take steps to avoid the collision but she must do so in season. (*Whittridge* v. *Dell*, 23 How. 448.) "A ship going out of port last," says Emerigon, "is to take care to avoid the vessel that has gone out before her" (Emerigon, c. 12, sec. 14, p. 330); and Valin says (vol. 2, p. 578): "Whether it be by night or day, the ship that leaves after another and follows her, should take care to avoid a collision, without which she will have to answer in

damages." (See opinion of Mr. Justice Clifford, 23 How. 454.)

As the collision did not occur until about two hours after the tug dropped the *Rival* a mile and a half ahead of the *Rosario*, it is evident that the latter approached the former very gradually. There was thus ample time for the *Rosario* to have taken means to prevent the collision as soon as it seemed likely to occur, and before the danger became imminent.

Both vessels were on or near the bar. Had the *Rosario* seasonably dropped an anchor, all danger of a collision would have been avoided, and this simple precaution it was clearly her duty as the vessel astern to take.

The cause of the collision is, I think, clearly revealed by the mate of the *Rosario*. He testifies that when the vessels were about one eighth or a quarter of a mile apart, the master of the *Rival* called out to the master of the *Rosario* to drop his anchor, to which the latter replied by telling him to drop *his*. Captain Swift of the *Rosario* testifies to the same effect. He states that about five minutes before the collision Captain Adams called out to him to drop his anchor; and when asked why he did not do so, he answered: "Captain Adams of course had charge of his ship, and I had charge of mine. Perhaps we saw things in a little different way. I don't know that I should obey Captain Adams; why didn't he anchor his ship? As I supposed was he going to drift clear of me, as he was going across my bow, I didn't cast my anchor. I supposed he would drift on to me if I had done so."

This last intimation that in his opinion it would have been imprudent to drop his anchor is hardly consistent with the admitted fact that he did let go his anchor, by which, as he states, the vessel was brought up before the collision. If the depth of water was as claimed by the respondents, it was impossible that the vessel could have been brought up with the length of chain then ranged before the windlass, unless we except Mr. Pauzus' statement that he paid out forty-five fathoms of chain before the collision, and that "it fetched her up." This operation he does

not pretend to have commenced until the vessels had approached within one and a half or probably two ship-lengths of each other. But the fact that it was resorted to, although too late, is a sufficient answer to Captain Swift's suggestion that by dropping anchor the chances of collision would have been increased.

The answer alleges as a fault on the part of the *Rival*, that immediately before the collsiion she attempted to tack, and failing to do so was taken aback and drifted down on the *Rosario*. But this is denied by all on board the *Rival*, and under the circumstances it seems almost impossible that she should have made any such attempt.

It appears from all the testimony that there was little or no wind—not enough to afford good steerage way to either vessel. No captain in his senses would have attempted to tack under such circumstances. If, as some of the witnesses state, a puff came out from the south-west just before the collision, it gave the *Rival* a fair wind, as her course lay to the northward and westward; she had therefore no motive to tack, even if the manœuvre had been practicable.

The testimony in the case is quite voluminous. There are, as usual, many contradictions and discrepancies in the statements of the witnesses, even when testifying on the same side.

But the principal facts of the case can be clearly discerned. The *Rosario* going out behind the *Rival*, overtook and ran into her through neglect of measures to avoid her, which the law called on her master to adopt.

Decree for libellants. Cross-libel dismissed.

THE WHISTLER—A. M. SIMPSON, CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.
AUGUST 31, 1882.

1. PLEADINGS.—New matter in an answer constituting a defensive allegation should be articled and pleaded separately, and not blended with the reponse to any article of the libel.

2. EXCEPTIONS.—Exceptions to an answer for insufficiency and impertinence are taken for entirely different causes, and therefore they ought not to be taken to the same matter either conjunctively or disjunctively.
3. PILOT SERVICE—PLACE OF TENDER OF.—A state may permit or require its pilots to tender their services to inward-bound vessels at a greater distance from the shore than three miles, or the outward limit of the pilot ground.
4. IDEM—OFFER OF, WHEN SUFFICIENT.—The bark *Whistler* was approaching the mouth of the Columbia river, with intent to enter and load there as soon as one of the three pilot tugs stationed there should come out to her without orders to go elsewhere; and being met by one of said tugs without such orders, she was taken in tow thereby and went in, but on the day before, and while she was standing off and on about thirty miles from the bar, she was hailed by an Oregon schooner pilot, who tendered his services to pilot her in, which were refused. *Held*, that the vessel was "bound in the river," within the meaning of the statute giving full pilotage for the offer and refusal of such services, and having afterwards gone in, the libellant became entitled to such pilotage.

Before DEADY, District Judge.

Frederick R. Strong, for libellant.

John W. Whalley, for claimant.

DEADY, J. The libellant, George W. Woods, brings this suit to enforce a lien upon the American bark *Whistler* for the sum of seventy-two dollars, for pilotage, arising, as he alleges, as follows:

On March 18, 1882, the libellant, being a duly licensed pilot, under the laws of Oregon, for the Columbia River below Astoria, hailed the said vessel and offered to pilot her across the bar of said river to Astoria—she being then in the open sea, outside of said bar, drawing nine feet of water, and bound for said port—which offer the master of said vessel declined; but afterwards, on the same day "entered said port" under the charge of another pilot, by reason whereof the libellant became and is entitled to full pilotage—eight dollars per foot draft, from said vessel.

The answer of the claimant, A. M. Simpson, admits the offer and refusal of the libellant's services; but denies that the vessel was then upon the pilot-ground or bound for the port of Astoria, or that she ever entered the same, or that the libellant made the first offer to pilot her; and alleges

that on March 6th the *Whistler* sailed from San Francisco on "a coasting voyage, bound to the mouth of the Columbia river for orders," to be there received from one of the three tugs, naming them, to the effect that the master was to take his vessel to Puget sound or into the Columbia river, and if no orders were received from either of said tugs the vessel was to proceed to Knappton, W. T., in tow of the first one that came to her, and there load with lumber for San Francisco; that when the libellant hailed the vessel "she was lying off and on about thirty miles from the mouth of the Columbia river, awaiting the arrival of one of the said tugs," and had not received orders from any of them as to "his future course;" and, that on March 19th, one of said tugs hailed said vessel, without orders, whereupon, in pursuance of his sailing directions, the master of the latter requested the tug to tow him to Knappton, which was done, when he loaded with lumber for San Francisco.

The libellant excepts to portions of the answer, setting them out *in extenso*, as insufficient, irrelevant, and impertinent. The answer is not *articled*, but run together in a continuous statement, without special references to the articles of the libel to which it relates, but the portions excepted to may be briefly referred to as follows: 1. The denial that the vessel was bound to Astoria or that she entered there; 2. The allegation that she came to the mouth of the river under directions to take order for her future course from one of the tugs; and 3. That she had not received her orders when hailed by the libellant, but entered the river afterwards in pursuance of the same and loaded with lumber at Knappton.

An exception to an answer in admiralty ought to specify whether it is taken for insufficiency or impertinence. They are very different grounds, and an exception to an allegation for both causes on one or the other of them is not good pleading. The former is only allowed upon the ground that the answer, so far as excepted to, is not a full and explicit response to the allegation or allegations of the libel, while the latter merely raises the question of whether the answer is a response and defence to such allegation. (*The California*, 1 Saw. 465.)

The first of these exceptions is not well taken in any view of the matter. The allegations excepted to are clear and explicit and in direct response to the libel. If the libellant is of the opinion, as he well may be, that it is immaterial in this case whether the *Whistler* was bound to Astoria or did go there, so that she entered the river, he should not have alleged the fact in his libel. Having made the allegation and called upon the claimant to answer, he cannot object that it is impertinent, even if the allegation and answer are both immaterial. The only way to get rid of the matter, if it is thought desirable, is to amend the libel and omit it.

The matter embraced in the second and third exceptions is a defensive allegation, and, however sufficient as such, is liable to an exception for impertinence, because not separately pleaded, but blended with the matter in response to the libel. (*The California*, 1 Saw. 465.) But the exceptions were argued by counsel without reference to this point, and will be so considered.

If the offer of the libellant to pilot the *Whistler* was a valid one, the liability of the vessel to him for full pilotage is not denied. The pilot law of Oregon (Gen. L. 708) provides that the master of a vessel may pilot her "from outside the Columbia river bar into said river," but he shall "pay to such pilot as shall first offer his services outside of the bar full pilotage," which, by the same law (p. 707), is fixed at eight dollars per foot draft for the first twelve feet.

Some effect, prejudicial to the offer of the libellant, is attempted to be given by the answer, to the fact as therein alleged, that it was made at some distance beyond the bar—say thirty miles. No authority has been cited on the point, and but little attention paid to it on the argument. There is no provision in the Oregon law defining the limit of the bar pilot ground outwardly, further than what is implied in the use of the phrase "Columbia river bar" (Gen. L. 706); but it is implied both from usage and the law, that a pilot may cruise beyond that, for it is provided (Id.), that the pilots on the bar shall keep a seaworthy boat "to cruise outside the bar," and an incoming vessel is made liable for

full pilotage to the first pilot who offers his services outside of the bar." (Id. 708.)

While it may be that the state cannot extend the pilot ground at the mouth of the river indefinitely into the sea and probably not farther than three miles beyond the head land, it does not follow that she may not permit and require her pilots to cruise for vessels at a much greater distance from shore, nor that an offer of pilot service, to be performed on the pilot ground, made at such distance, to a vessel bound in the river, is not valid and effective, as if made within three miles of the shore.

In *Lea* v. *Ship Alexander and Cargo*, 2 Paine, 468, Mr. Justice Wayne says, that the term "cruising ground" is not synonymous with "pilot's water or pilotage ground." "By pilots' cruising ground is meant that distance out in the sea along a certain extent of coast that pilots cruise for vessels bound to ports, inlets, harbors, rivers, or bays, into which a pilot may take them by his commission. By pilot's water or pilotage ground, is meant the access to a bay, inlet, river, harbor, or port, beginning at the exterior point where a pilot may take leave of an outward-bound vessel, and extending to the place fixed upon by law or usage for the anchorage or mooring of inward-bound vessels."

In *Horton* v. *Smith*, 6 Ben. 264, Judge Benedict in considering this question, says: "It is the policy of most pilot laws to induce the pilots to make an early tender of their services to inward-bound vessels. * * * State boundaries have been sometimes considered as furnishing the outward limit (1 Daly, 185), although Sandy Hook pilots are sought for, and their services taken, much farther out than a marine league. In France it has been adjudged, in regard to vessels bound to Havre, that the pilots may board such vessels at any time or distance out, and the liability to take a pilot has been adjudged to attach to a French ship although she was at the time in English waters, as at the Downs. (Cour Cass. D. 1866, p. 303, Caumonte, Traité Pilote, 31.)"

The offer, in my judgment, is not insufficient on account of the place where it was made. Was the offer invalid on ac-

count of the direction given to the master not to enter, if he got orders by the tug to go elsewhere? I think not. The *Whistler* was bound in the Columbia river, subject to a contingency that never happened—and she came in. No order was received from the tug, and the vessel, in pursuance of the purpose with which she came to the bar, went into the river on the voyage in which she received the offer of pilot service from the libellant. The offer of pilot service was made upon the assumption that the vessel was then bound in the river, and also upon the contingency that she would go in. If she met orders at the month that turned her back, or was foundered or blown away, before the pilot service was or could be performed, then the offer went for naught.

But the offer having been made while the vessel was on her way to and approaching the mouth of the river with the intent to enter, unless turned away by a contingency which did not happen, to wit, an order from the tug, and having entered in pursuance of such purpose, it is, in my judgment, an offer of pilot service within the letter and spirit of the law, and being refused, entitles the libellant to full pilotage.

If the law were otherwise it would be very easy to have an understanding between coasters and the tugs at the mouth of the river by which the pilots who cruise for vessels in a pilot boat outside would be unjustly deprived of all benefit of their enterprise in hailing vessels beyond the bar, in favor of the tug pilots who wait inside in ease and safety until they are signaled by the approaching vessel. All that is necessary, is to give the master directions on leaving port not to go in the river until met by a tug, and then to go in with the tug and its pilot, unless he there receives orders to the contrary—orders which he is certain not to receive and no one ever expected he would.

Indeed when all the circumstances are considered—those of general notoriety as well as those set out in the pleadings—it is difficult to avoid the conclusion that this defense is a mere preconcerted device to prevent the schooner

pilots from making an effectual offer of pilot service to the *Whistler*, before she was taken in tow by the tug as per previous arrangement with the owners of both.

The exceptions are allowed.

THE RAILROAD TAX CASE.

COUNTY OF SAN MATEO *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
SEPTEMBER 25, 1882.

1. THE FOURTEENTH AMENDMENT OF THE CONSTITUTION, in declaring that no State shall deny to any person within its jurisdiction the "equal protection of the laws," imposes a limitation upon the exercise of all the powers of the State, which can touch the individual or his property, including among them that of taxation.

2. THE "EQUAL PROTECTION OF THE LAWS" to any one implies not only that he has a right to resort, on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation.

3. UNIFORMITY IN TAXATION requires uniformity in the mode of assessment as well as in the rate of percentage charged.

4. TAXATION OF MORTGAGES—PUBLIC CORPORATIONS AND NATURAL PERSONS.—By the thirteenth article of the Constitution of California, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, is treated, for the purposes of assessment and taxation, as an interest in the property affected thereby," and, "except as to railroad and other *quasi* public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. (Sec. 4.) But by the same article "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county," are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein, no deduction from this value being allowed for any mortgages on the property: *Held*, That in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations as the basis of taxation, there is a departure from the rule of equality and uniformity.

5. PRIVATE CORPORATIONS ARE PERSONS, within the meaning of the first section of the Fourteenth Amendment, and are entitled, so far as their property is concerned, to the equal protection of the laws.
6. NOTICE—DUE PROCESS OF LAW.—Neither the Constitution nor the laws of California relating to the assessment of railroads operated in more than one county provide for notice to the owner, or an opportunity for him to be heard at any stage of the proceeding. In this respect both conflict with the guaranty that no one shall be deprived of his property without due process of law.
7. SAME—NOTICE ESSENTIAL.—Whatever the character of the proceeding, by which one is deprived of his property, whether judicial or administrative; and whether it takes the property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law.
8. THE PROVISIONS OF ARTICLE XIII OF THE CONSTITUTION OF CALIFORNIA, treating of revenue and taxation, are not conditions upon the continued existence of railroad corporations.
9. POWER OF STATE OVER CORPORATIONS.—The State possesses no power to withdraw corporations from the guaranties of the Federal Constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation.
10. SAME.—Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the State cannot exercise any control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested.
11. JOURNALS OF LEGISLATURE, COURT WILL NOTICE.—The Constitution of California (Sec. 15, Art. IV) provides that "on the final passage of all bills they shall be read at length and the votes shall be by yeas and nays upon each bill separately, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under this provision the Court, to inform itself, will look to the journals of the Legislature, and if it appear therefrom that the bill did not pass by the constitutional majority, then it will not be regarded as a law.
12. STATUTE NOT PASSED.—The journals of the Legislature show that the Act of March 14, 1881, mentioned in the opinion, never became a law.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

STATEMENT OF THE CASE.

THIS was an action commenced by the county of San Mateo, of California, under the provisions of an Act of the State, of 1880 (Statutes of 1880, page 136), for the recovery of State and county taxes, claimed to be due from the de-

fendant to the plaintiff for the fiscal year 1881–'82. The complaint is in the form prescribed by the statute. The amended answer contains a general denial of every allegation of the complaint, and sets up special matters as a defense. With this general denial the Court does not deal; it deals only with the special matters pleaded, it having been agreed by counsel that if they constitute a defense to the action judgment final shall be entered for the defendant, otherwise for the plaintiff.

The material averments of the answer in this respect are, that the defendant is a corporation existing under the laws of the United States and of the State of California, having its principal place of business in the city and county of San Francisco; that it was organized in the year 1878 under an Act of the Legislature of the State, entitled "An Act to provide for the incorporation of railroad companies, the management of the affairs thereof, and other matters relating thereto," approved May 30, 1861; that the term of its existence was to be fifty years from the date of its organization; that it is still in existence under said laws, except in so far as its existence and character are affected by the federal enactments referred to and made part of the answer; that many of its stockholders and members now are and ever have been citizens of the United States, residents of the State of California, while many other stockholders and members are citizens of the United States and residents of States other than the State of California; that it constructed a line of railroad known as the Southern Pacific Railroad, which commences at the city of San Francisco, and extends in a southerly direction to connect with the Texas and Pacific Railroad and the Atlantic and Pacific Railroad, both of which are chartered by Act of Congress; that prior to the first day of January, 1881, it was indebted to divers persons, citizens of the United States, many of them citizens and residents of the State of California, in large sums of money, which were advanced for and used in the construction and equipment of the defendant's railroad; that to secure the payment of such indebtedness, the company, prior to the first day of January, 1881, executed and delivered a mortgage upon its railroad,

rolling stock, appurtenances, and franchise, and upon divers tracts of land belonging to it and situated in different parts of the State; that the indebtedness so secured exceeds $3000 per mile, and is still subsisting, secured as aforesaid, no part thereof having been paid except its accruing interest.

It is further averred, that the assessment, according to which the taxes claimed were levied, was made on the second day of May, 1881, by the Board of Equalization of the State of California; that the Board assessed against the defendant the whole of its railroad property, and failed to deduct from its value the mortgage given thereupon to secure said indebtedness; that the assessment was made without notice to the defendant, and that neither the Constitution nor the laws of the State of California provided in respect to such assessment an opportunity of time, place, or tribunal for the defendant to be heard, or for any notice to the defendant before its liability was fixed; that all owners of railroad property situated in said State, and operated in more than one county, as is the property of the defendant, are denied any protection from the laws of California, which require, with respect to other property, that notice of its assessment shall be given to the owners; which require, that before its liability shall be fixed, an opportunity to be heard shall be afforded to them; which give to them an appeal from the assessor to a Board of Equalization; which require the assessment to be made in the counties in which the property is situated, and prevent its being made in localities distant from the *situs* of the property; and which allow deductions from its valuation for indebtedness secured by mortgage.

It is further averred, that at and before, and ever since, the adoption of the Constitution of California now in force, there were and have been existing under the laws of said State corporations of various kinds, formed for the purpose of, and actually operating and doing business and holding and using property in, more than one county in the State; that at all said times there were, and there are now, divers natural persons, residents of said State, operating property

in more than one county; that at all of said times there were, and now are, railroads owned by corporations formed under the general laws of said State, which are operated only in one county; that by the provisions of Section 10, Article XIII, of the State Constitution, persons operating railroads in more than one county in the State have been singled out from other persons operating property in more than one county in the State, and denied the right, common to all other persons, to apply for relief from over-valuation of their property by the assessor to local Boards of Equalization, and denied the rights and privileges accorded by law to all other persons in that respect.

It is further averred, that the franchise of the defendant is held and its corporate powers exercised under authority of the Government of the United States; that by the several Acts of Congress, set out in the answer, the defendant was selected by the Government of the United States as a means and instrument of that government to construct the railroad in question, and to keep and maintain the same in repair, to the end that the Government of the United States might, when occasion required, use the same for the transportation of its armies, military stores, and mails, and for such other purposes as said government, in the exercise of its powers, might desire to use the same; that the Government of the United States has never given to the State of California the right to lay any tax on the franchise, existence, or operation of defendant; that such a tax would hinder and impede the lawful operations of the Government of the United States, and would hinder, delay, and prevent the defendant from performing the obligation imposed upon it by said Acts of Congress, and would wholly nullify and prevent the enforcement of the same; and that in the assessment which constitutes the basis of plaintiff's action, the valuation of the franchise of the defendant—its right to exist—is so blended with the valuations affixed to the roadway, roadbed, rails, and rolling stock, that it can neither be distinguished nor separated from them.

Upon the matters thus averred, it was alleged and claimed by the defendant, that in the assessment of its property,

according to which the taxes in suit were levied, an unlawful and unjust discrimination was made between its property and the property of individuals, to its disadvantage, in that it was not allowed any deduction from the valuation of its property for the mortgage thereon, which is allowed for mortgages in the assessment of property of individuals; and that the company was thus subjected to an unequal share of the public burdens; and that, as this discrimination was made in pursuance of provisions of the Constitution of the State, the company was denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution.

It was further alleged and claimed by the defendant that the assessment of its property was illegal and void, because made in pursuance of the provisions of the State Constitution, which gave no notice to the defendant, and afforded it no opportunity to be heard respecting the value of its property, or for the correction of any errors of the State Board, thus depriving it of its property without due process of law guaranteed by that amendment.

It was also averred and claimed that the franchise of the defendant was exempt from State taxation, the defendant having been selected by the Government of the United States as a means and instrument to construct the road, and to keep the same in repair, for the transportation of the troops, military stores, and mails of the United States; and for such other purposes as the government, in the exercise of its powers, might desire.

The case was argued before Mr. Justice Field and Judge Sawyer, the argument commencing on the 21st day of August, 1882, and closing on the 29th. The opinions were read in the Circuit Court on September 25, 1882.

A. L. Rhodes, Attorney-General Hart, District-Attorney Towle, of Marin County, *and District-Attorney Ware,* of Sonoma County, for plaintiff.

Creed Haymond, J. Norton Pomeroy, T. I. Bergin, T. B. Bishop, and James A. Johnson, for defendant.

OPINION OF THE COURT.

By the Court, FIELD, Circuit Justice. This action is brought to recover from the Southern Pacific Railroad Company, a corporation formed under the laws of California, certain State and county taxes levied upon its property for the fiscal year of 1881 and 1882, alleged to be due to the plaintiff, with five per cent. added for their non-payment and interest. It was commenced in one of the Superior Courts of the State, and, on application of the defendant, was removed to this Court.

The railroad company, besides a general denial of the allegations of the complaint, sets up as a special answer to the action, that in the assessment of its property, according to which the taxes claimed were levied, an unlawful and unjust discrimination was made between its property and the property of individuals to its disadvantage, subjecting it to an unequal share of the public burdens; and that it was not afforded an opportunity of being heard respecting the assessment, and that such discrimination was made and proceeding had under the provisions of the Constitution of California, adopted in 1879, which in that respect are in conflict with the Fourteenth Amendment of the Constitution of the United States.

By the Constitution of California all property in the State, not exempt under the laws of the United States, is, with certain exceptions, to be taxed in proportion to its value, to be ascertained as prescribed by law; but in the ascertainment of its value as a basis for taxation, a distinction is made between the property owned by individuals and that owned by railroad corporations. By the thirteenth article, "a mortgage, deed of trust, contract, or other obligation by which a debt is secured," is treated for the purposes of assessment and taxation, "as an interest in the property affected thereby," and, "except as to railroad and other *quasi* public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. (Sec. 4.) But by the same article "the franchise, roadway, roadbed, rails, and

rolling stock of all railroads operated in more than one county," are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located in proportion to the number of miles of railway laid therein. No deduction from this value is allowed for any mortgages on the property.

By the Constitution there is also a different system of assessment provided for "the franchise, roadway, roadbed, rails, and rolling stock" of railroads operated in more than one county from that provided for other property. The assessment of other property is to be made in the county, city, or district in which it is situated, in the manner prescribed by law; and the Supervisors of each county constitute a Board of Equalization of the taxable property of the county, and must act upon prescribed rules of notice to its owners. A State Board of Equalization is also created to equalize the valuation of the taxable property of the several counties, so that equality may be preserved between the taxpayers of the different localities, and its action in this respect must likewise be upon prescribed rules of notice.

The assessment of the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county in the State is to be made by this State Board. And in making it, the Board is not required to give any notice to the owners, nor is any provision made for affording them an opportunity to be heard respecting the valuation of their property. The tenth section of the article which confers this power of assessment has been held by the Supreme Court of the State to be self-executing, requiring no legislation for its enforcement.

The defendant, as already stated, is a corporation formed under the laws of the State, and operates a railroad through several counties. The entire length of its road in the State is a little over seven hundred and eleven miles, of which twenty-five miles and one tenth of a mile pass through the county of San Mateo. Its principal place of business is at San Francisco. Its stockholders are, and always have been, citizens of the United States, some of whom are residents of this State, and some of other States. Previously to Jan-

uary 1st, 1881, it was indebted to different citizens of the United States, many of them residents of this State, in large sums, advanced to construct and equip the road; and to secure this indebtedness it executed, prior to that date, a mortgage upon its road, its franchise, and its rolling stock and appurtenances, and also upon a large number of tracts of land situated in different counties. The indebtedness secured exceeds $3,000 a mile of the road, no part of which, except the accruing interest, has been paid; the whole remains a valid and subsisting obligation of the company.

In the fiscal year of 1881 and 1882 the State Board of Equalization assessed the franchise, roadway, roadbed, rails, and rolling stock of the defendant at $11,739,915, that is, at the rate of $16,500 per mile, and apportioned to the county of San Mateo $414,150. Upon the amount thus apportioned the taxes were levied, for which the present action is brought. In the assessment no deduction was allowed for the mortgage, but the property was assessed at its entire value independently of the mortgage. Nor was any notice given to the company by the Board of its action, nor was any opportunity allowed the company to be heard respecting the assessment. These facts are admitted by the demurrer, and the validity of the defense rests upon the application of the law to them.

The railroad company contends that the taxes are invalid and void on two grounds: 1st, because the assessment, according to which they were levied, was made in pursuance of the discriminating provisions of the State Constitution, in the enforcement of which the company was not allowed any deduction from the valuation of its property for the mortgage thereon; and was thus subjected to an unjust proportion of the public burdens, and denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution; and, 2d, because the assessment was made in pursuance of provisions of the State Constitution, which gave no notice to the company, and afforded it no opportunity to be heard respecting the value of the property, or for the correction of any errors of the Board, thus depriving it of its property without due process of law guaranteed by that amendment.

The plaintiff, on the other hand, contends:

1st. That the power of taxation possessed by the State is unlimited, except by the Constitution of the United States, and that its exercise cannot be assailed in a Federal Court, either for the hardship or injustice of the tax levied;

2d. That the classification of property for taxation, and the apportionment of taxes according to such classification, are not forbidden by the Constitution of the United States; and that within this principle the taxes on the property of the railroad company were lawfully imposed;

3d. That the Fourteenth Amendment of the Constitution of the United States was adopted to protect the newly made citizens of the African race in their freedom, and should not be extended beyond that purpose;

4th. That corporations are not persons within the meaning of that amendment;

5th. That the statute fixing the sessions of the State Board of Equalization, and requiring a statement in writing from the defendant of the amount and value of its property, afforded all the notice and hearing essential to the validity of the assessment made; and,

6th. That the provisions of Article XIII of the Constitution, as to the taxation of railroad property, are to be treated as conditions upon the continued existence of railroad corporations.

We do not state the positions of the several counsel, who argued the case, in their precise language, for they were presented in various forms, but we give their substance and purport.

The questions thus presented for our determination are of the greatest magnitude and importance. The answer to them concerns not merely the railroad corporations of this State, but all corporations, other than municipal, within the United States. It is of the highest interest to them all to know whether their property is subject to the same rules of assessment and taxation to which the property of individuals is subject, or whether it can be separated and distinguished from that of individuals and made liable to such different burdens in the way of taxation as the State may

choose to impose. The questions have been argued with great ability and learning by distinguished counsel on both sides, and they have received from the Court the most patient and thoughtful examination. Indeed, their examination has been accompanied with a painful anxiety to reach a right conclusion, aware, as the Court is, of the opinion prevailing throughout the community—that the railroad corporations of the State, by means of their great wealth and the numbers in their employ, have become so powerful as to be disturbing influences in the administration of the laws; an opinion which will be materially strengthened by a decision temporarily relieving any one of them from its just proportion of the public burdens. That consideration, however, cannot be allowed to affect the judgment of the Court. Whatever acts may be imputed, justly or unjustly, to the corporations, they are entitled, when they enter the tribunals of the Nation, to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others.

It is undoubtedly true that the power of taxation possessed by the State may be exercised upon any subject within her jurisdiction, and to any extent, not prohibited by the Constitution of the United States. As stated by the Supreme Court, "it may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." (*State tax on Foreign-held Bonds*, 15 Wall. 319.)

It is also undoubtedly true that the hardship and injustice of a tax levied by the State, considered with reference to its amount, are not subjects of Federal cognizance. Whether a tax upon property, subject to taxation, be one

per cent. of its value, or ten per cent., or twenty, or more, is a mere matter of State discretion; a question of policy and not of power. So we often find in the reports language to the effect that the State's power of taxation is without limitation; language which may be correct when applied to the special facts of the cases in which it is used, but which should always be read with a reservation that the exercise of the power does not conflict with any of the inhibitions of the Federal Constitution.

There are in the very nature of the Federal Government, and the powers with which it is clothed, many prohibitions upon the taxing power of the States. Within the sphere of its action that Government is supreme, and no impediment to the free and full exercise of its powers is permissible. The State cannot, therefore, place any restrictions upon the agencies of the Federal Government; otherwise it might embarrass and even defeat the operations of that Government. It was long ago said by Chief Justice Marshall, that the power to tax involves the power to destroy; and that there would be a manifest repugnance in allowing one Government to control the constitutional measures of another Government in respect to which the latter is declared to be supreme. When, therefore, Congress had created a bank of the United States as an agency in the management of the finances of the Government, it was held that the States were inhibited from taxing the institution. "If the States," said that great Judge, "may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the Custom House; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their Government dependent on the States." (*McCullough* v. *Maryland*, 4 Wheat. 432.)

For like reasons the public securities of the United States are exempt from taxation by the States, except so far as

such taxation is permitted by Congress. A tax imposed by the city of Charleston upon all personal estate in its limits, including, among other things, stock of the United States, was, therefore, adjudged to be invalid. The Court said that the tax was upon a contract between the Government and individuals, and therefore operated directly upon the power to borrow money on the credit of the United States, that if the right to impose it existed with the States, it was a right which in its nature acknowledged no limits, and might be exercised to an extent which would seriously embarrass the Government. Its existence was, therefore, held inconsistent with the supremacy of the Government in the exercise of its granted powers. (*Weston* v. *Charleston*, 2 Peters, 449.)

Other illustrations might be given of implied inhibitions of the Federal Constitution to taxation by the States. The powers of the general Government cannot be interfered with, nor their exercise embarrassed in any respect by such taxation; as has often been held with reference to attempted taxation on goods imported, whilst retaining the character of imports in unbroken packages, and on goods in transit from one State to another. The power to regulate commerce, foreign and inter-state, cannot be thus trammelled by State action. (*Brown* v. *Maryland*, 12 Wheat. 434; *Welton* v. *State of Missouri*, 100 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.)

So in regard to the express prohibitions upon the States, contained in the Federal Constitution; they apply equally to taxation and to any other action of the State. They cannot be evaded under the plea that the State possesses the unrestricted power to tax. Where, for example, a State has stipulated for a valid consideration to exempt certain property from taxation, as it has been repeatedly held that it may do, the stipulation cannot subsequently be withdrawn, and the property subjected to taxation. The provision which secures the inviolability of contracts against State legislation stands as a perpetual interdict against the imposition of the charge. It is to no purpose in such case to speak of the power of taxation as an attribute of State sovereiguty, which cannot be surrendered; that sovereignty,

whatever its extent, must be exerted in subordination to the prohibition of the Constitution, which is the supreme law of the land. Many of the attributes of sovereignty, which the States would possess if independent political communities, have been in like manner surrendered to the Federal Government, such as the power to declare war, to make peace, to enter into treaties of alliance, and to regulate commerce with foreign nations. The question in all cases presented to a Federal Court, where complaint is made of a tax levied by the States, is whether there is any inhibition, express or implied, in the Constitution of the United States upon the imposition of the tax. If there be, it is the duty of the Court to enforce the inhibition, it matters not whom its decision may affect, or how great and irresponsible the power of the State may be independently of such prohibition.

The Fourteenth Amendment of the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one, on similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.

Unequal exactions in every form, or under any pretence, are absolutely forbidden, and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their

property of the same kind, similarly situated, at different rates; where, for instance, one may be taxed at one per cent. on the value of his property, another at two or five per cent., or where one may be thus taxed according to his color, because he is white, or black, or brown, or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property.

In the Constitution of several States a provision is found requiring "equality and uniformity" in the taxation of property, and this is held to mean that taxes must be levied according to some fixed rate or rule of apportionment, so that all persons shall pay the like amount upon similar kinds of property of the same value. As it seemed to one of the judges of the Supreme Court of Michigan: "To compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to levy a forced contribution, not a tax, duty, or impost, within the sense of these terms as applied to the exercise of powers, by any enlightened or responsible government." (*Woodbridge* v. *The City of Detroit*, 8 Mich. 301; Burroughs on Taxation, chap. v.) Absolute equality and uniformity may not be attainable in practice, but an approximation to them is possible, and any plain departure from the rule will defeat the tax.

What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the Fourteenth Amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio would be inconsistent with that equal protection which the amendment requires the State to extend to every person within its jurisdiction.

The application of the amendment to taxation has been recognized by the legislation of Congress. Soon after the adoption of the constitutional amendment abolishing slavery and involuntary servitude, measures were proposed to give practical freedom to the emancipated race, which resulted in

the passage of the Civil Rights Act. This Act gave citizenship to persons of that race, and then declared that citizens of the United States, of every race and color, without regard to any previous condition of slavery or involuntary servitude, should have the same right in every State and Territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, own, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and should be subject to like punishments, pains, and penalties, and to none other. After the adoption of the Fourteenth Amendment Congress re-enacted this Act, and to the clause, that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishments, pains, and penalties, it added, and subject only to like "*taxes, licenses, and exactions of every kind, and to no other.*" (R. S., sec. 1977.)

The adjudications as to the meaning of the rule of equality and uniformity to be observed in taxation may, therefore, be properly referred to in construing the requirement of the Fourteenth Amendment when it is invoked with respect to burdens imposed by taxation. In *Lexington* v. *McQuillan's Heirs*, the Supreme Court of Kentucky said that the Legislature of the State had no constitutional authority to exact from one citizen the entire revenue of the commonwealth; and though the distinction between constitutional taxation and the taking of private property for public use by legislation might not be definable with perfect precision, the Court was clearly of the opinion that whenever the property of a citizen was taken from him by the sovereign will and appropriated without his consent to the benefit of the public, the exaction could not be considered a tax unless similar contributions were made by the public itself, or rather exacted by the same public will from such constituent members of the same community as own the same kind of property; and that, though there may be a discrimination in the subjects of taxation, still persons of the same class, and property of

the same kind, must generally be subjected alike to the same common burden. (9 Dana, Ky., 513.)

In *State* v. *Township of Readington*, the Supreme Court of New Jersey said: "Taxation operates upon a community, or a class in a community, according to some rule of apportionment. When the amount levied upon individuals is determined without regard to the amount or value exacted from any other individual, or classes of individuals, the power exercised is not that of taxation, but of eminent domain. A tax upon the persons or property of A, B, and C individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons, or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation, and not of taxation." (36 N. J. L. 70.)

As the foundation of all just and equal taxation is the assessment of the property taxed, that is, the ascertainment of its value, in order that the tax may be levied according to some ratio to the value, uniformity of taxation necessarily requires uniformity in the mode of assessment, as well as in the rate of taxation; or, to quote the language of the Supreme Court of Ohio, expressing the same thought: "Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation." (*Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. Rep. 1.)

If we now look at the scheme of taxation prescribed by the Constitution of California for the property of railroad companies, we shall perceive a flagrant departure from the rule of equality and uniformity so essential to equality in the distribution of the burdens of government. Whenever an individual holds property encumbered with a mortgage, he is assessed at its value, after deducting from it the amount of the mortgage. If a railroad company holds property subject to a mortgage, it is assessed at its full value, without any deduction for the mortgage; that is, as though the property were unencumbered. The inequality and discrimi-

nating character of the procedure will be apparent by an illustration given by counsel: Suppose a private person owns a farm which is valued at $100,000, and is encumbered with a mortgage amounting to $80,000; he is, in that case, assessed at $20,000; if the rate of taxation be two per cent., he would pay $400 taxes. If a railroad corporation owns an adjoining tract worth $100,000, which is also encumbered by a mortgage for $80,000, it would be assessed for $100,000, and be required to pay $2,000 taxes, or five times as much as the private person. There is here a discrimination too palpable and gross to be questioned, and such is the nature of the discrimination made against the Southern Pacific Railroad Company in the taxation of its property. Nothing can be clearer, than that the rule of equality and uniformity is thus entirely disregarded.

The case of *People* v. *Weaver* (100 U. S. 539), decided by the Supreme Court, respecting the taxation of shares of the National Banks, may be cited in this connection. Without the permission of Congress, the shares of these banks could not be taxed by the States. Congress gave the permission on condition that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, and that the shares owned by non-residents of the State should be taxed at the place where the bank is located. (R. S., sec. 5219.) In the case cited, the Court held, with regard to such taxation, 1st, that the prohibition imposed by Congress against discrimination had reference to the entire process of assessment, and included the valuation of the shares as well as the rate of percentage charged; 2d, that a statute of New York, which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital, was in conflict with the prohibition, although the same percentage on such valuation was levied; and 3d, that a statute which permitted a party to deduct his debts from the valuation of his personal property, except so much as consisted of those shares, taxed the shares at a greater rate than other moneyed capital. The assessment thus held to be a discrimination against the shares of

National Banks in the taxation system of New York is similar to what we hold to be a discrimination against the property of railroad corporations in the taxation system of California.

In the case of the *Evansville Bank* v. *Britton*, decided at the last term of the Supreme Court, the doctrine of the Weaver case was affirmed, and it was held that the taxation of shares in the National Banks, under the revenue laws of Indiana, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, which was allowed in the case of other investments of moneyed capital, was a discrimination against the Act of Congress, and illegal. (105 U. S. 322.)

It is no answer to this discrimination to say that property in the State may be divided into classes, and different rates prescribed for them. Undoubtedly property may be classified for purposes of taxation. Real property may be subjected to one rate of taxation, personal property to another rate. Property in particular districts may be taxed for local purposes, whilst property elsewhere may be exempt. Taxation on business, in the form of licenses, may also vary according to the calling or occupation licensed and the extent of business transacted, but even then there must be uniformity of charges with respect to the same calling or occupation in the same locality. It is, however, only with the taxation of property that we are concerned in this case; and the whole object of classifying property is that each class may be subjected to a special rate of taxation. There is no difference in the rate prescribed by the law of the State for the property of railroad corporations and the rate prescribed for the property of individuals. There is only one rate for all property. There is, therefore, no case presented for the application of the doctrine of classification. The discrimination complained of arises from the different rule adopted in ascertaining the value of the property of railroad corporations as a basis for taxation—not from any different rate of taxation when the value is established. In all taxes upon property, whatever its form or nature, the property is taken as representing a pecuniary

value—as standing for so much money invested. The tax is the rate per centum of this pecuniary value. The value being ascertained, the law fixes the rate. The ground of complaint here is that the law requires a higher value to be placed upon the defendant's property than upon the property of individuals similarly encumbered, or rather requires the assessor of the defendant's property, in estimating its value, to disregard and set aside certain elements materially affecting its amount, which are to be considered in estimating the value of the property of individuals. It is not classifying property to make this distinction in determining its value. It is not classifying property to provide that the property of certain parties, which has a mortgage upon it, shall be assessed at its value after deducting the mortgage, and that the property of other parties, also having a mortgage upon it, shall be taxed at its full value, without any deduction. That is not providing for a different rate of taxation for different kinds of property, but for unequal taxation according to the character of the owner.

Is the defendant, being a corporation, a person within the meaning of the Fourteenth Amendment, so as to be entitled, with respect to its property, to the equal protection of the laws? The learned counsel of the plaintiff, and the Attorney-General of the State, take the negative of this question, and assert with much earnestness that the amendment applies, and was intended to apply, only to the newly made citizens of the African race, and should be limited to their protection.

It is undoubtedly true that the amendment had its origin in a purpose to secure to these newly made citizens the full enjoyment of their freedom. When the amendment abolishing slavery and involuntary servitude was adopted, there were men in Congress who believed that it was intended to make every one born within the United States a freeman, and as such to give to each the right to pursue his happiness in the ordinary vocations of life, subject to no restraint except such as affects others, and to enjoy equally with them the fruits of his labor. They, therefore, proposed the Civil Rights bill, and secured its passage, the substan-

tial provisions of which we have stated. Notwithstanding this expression of the National Legislature as to the purpose of the amendment, the newly made citizens were subjected in several of the States to various disabilities and burdens, and curtailed of their rights to such an extent that their freedom became of little value. To quote from the opinion of Mr. Justice Miller, speaking for the Court, in the Slaughter-house cases: "They were in some States forbidden to appear in the towns in any other character than as menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain and hire, and were not permitted to give testimony in the Courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were inefficient or were not enforced." (16 Wall. 70.) There was probably much exaggeration in what was reported of their treatment, but the statements made produced a profound impression upon Congress. The validity of the Civil Rights Act was also called in question, and in some instances was adjudged by State Courts to be invalid. Reports also prevailed that loyal men of the South were treated with exceptional harshness, and that men from the North seeking residence there were met with marked hostility and aversion. It is not surprising that such was the fact, for notwithstanding the fiery courage and martial spirit of her people, their battalions had gone down before the forces of the Union. With the sound of the tread of the victorious army still ringing in their ears; with the desolations of war all around them, and the sudden rupture of their social relations by the emancipation of their former slaves, it would have been a miracle if bitterness towards their recent foes had not lingered in their hearts and been exhibited in their conduct. A proud and brave people feel more keenly than others the sting of defeat. Undoubtedly much misconception and falsehood were mingled with the statements made respecting their action; nevertheless, they led to the introduction into Congress of the proposition for the Fourteenth Amendment. The discussion which followed

indicated that the purpose of its framers and advocates was to obviate objections to legislation similar to that contained in the first section of the Civil Rights Act, and to prevent for the future the possibility of any discriminating and hostile State legislation against any one.

Mr. Stevens, of the House of Representatives, in presenting the proposition, after stating the provisions of the first section, said: "I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other in our declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States so far *that the law which operates upon one man shall operate equally upon all.*" In reply to an objection that the first section of the amendment was in substance the Civil Rights bill, which Congress had passed over the President's veto, and that by voting to so amend the Constitution as to put the bill into it, was to admit that the bill was unconstitutional, Mr. Garfield, then also a member of the House, said: "We propose to lift that great and good law above the reach of political strife, beyond the reach of plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the Civil Rights bill unconstitutional, I am glad to see that first section here."

Though the occasion of the amendment was the supposed denial of rights in some States to newly made citizens of the African race, and the supposed hostility to Union men, the generality of the language used extends the protection of its provisions to persons of every race and condition against discriminating and hostile State action of any kind. Its effect, in preserving free institutions and preventing harsh and oppressive State legislation, can hardly be overstated. When burdens are placed upon particular classes or individuals, whilst the majority of the people are exempted, little heed may be paid to the complaints of those

affected. Oppression thus becomes possible and lasting. But a burdensome law, operating equally upon all, will soon create a movement for its repeal. With the amendment enforced, a bad or an oppressive State law will not long be left on any statute-book.

The argument that a limitation must be given to the scope of this amendment, because of the circumstances of its origin, is without force. Its authors, seeing how possible it was for the States to oppress, without relief from the Federal Government, placed in the Constitution an interdict upon their action, which makes lasting oppression of any kind by them under the form of law impossible.

The amendment prohibiting slavery and involuntary servitude, except as a punishment for crime, had its origin in the previous existence of African slavery. But the generality of its language makes its prohibition apply to slavery of white men as well as that of black men; and also to serfage, vassalage, villenage, peonage, and every other form of compulsory labor to minister to the pleasure, caprice, vanity, or power of others.

The provision of the Constitution prohibiting legislation by States impairing the obligation of contracts, had its origin in the existence of tender laws, appraisement laws, stay laws, and installment laws, passed by the States soon after the revolution, when their finances were embarrassed and their people were overwhelmed with debts. These laws, according to Story, prostrated all private credit, and all private morals, and led to the adoption of the prohibition, by which such legislation was forever prevented. But in its construction the provision has not been limited to mere commercial contracts. In the Dartmouth College case it was urged, that the charter of the college was not a contract contemplated by the Constitution, because no valuable consideration passed to the King as an equivalent for the grant, and that contracts merely voluntary were not within the prohibition. But Chief Justice Marshall, after showing that the charter was a contract upon a valuable consideration, said: "It is more than possible that the preservation of rights of this description was not particularly

in view of the framers of the Constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State Legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given;" and again: "The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception." (4 Wheat. 644.)

Following that authority, we can not adopt the narrow view for which counsel contend, and limit the application of the prohibition of the Fourteenth Amendment to legislation touching members of the enfranchised race. It has a much broader operation. It does not, indeed, place any limit upon the subjects, in reference to which the States may legislate. It does not interfere with their police power. Upon every matter upon which, previously to its adoption they could act, they may still act. They can legislate now, as they always could, to promote the health, good order, and peace of the community, to develop their resources, increase their industries, and advance their prosperity; but it does require that in all such legislation, hostile and partial discrimination against any class or person shall be avoided; that the States shall impose no greater burdens upon any one than upon others of the community under like circumstances, nor deprive any one of rights, which others similarly situated are allowed to enjoy. It forbids the State to lay its hand more heavily upon one than upon another under like conditions. It stands in the Constitution as a perpetual shield against all unequal and partial legislation by the States, and the injustice which follows from it, whether directed against the most humble, or the

most powerful; against the despised laborer from China, or the envied master of millions.

The adoption of the Federal Constitution met, as all know, with most determined opposition from a large class, who believed that the exercise of the powers delegated to the general Government would cripple and embarrass the States in the administration of their local affairs. The dread of centralization disturbed the minds of some of the purest and greatest statesmen of the day. This feeling continued after the adoption of the Constitution, and finally led to the first ten amendments. The population of the country was sparse; each State afforded security to its people, and was to them the special object of attachment. They enjoyed under its laws protection in their property, in their homes, and in their business. They felt a natural distrust of a power wielded by officers not selected by themselves. They apprehended that the rights which they enjoyed might be encroached upon, if not destroyed. So the amendments proposed contained limitations upon the powers of Congress; many of which were indeed unnecessary, but were adopted in order to prevent "misconception, or abuse of the powers of the general Government." They declared, among other things, that certain liberties should not be abridged, such as the free exercise of religion, the freedom of speech and of the press; that certain rights should not be taken away, such as the right of the people to peaceably assemble and petition for a redress of grievances, and to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; that certain securities against wanton prosecution for public offenses should not be withdrawn, such as that no person should be held to answer for a felony, except upon the presentment or an indictment of a grand jury; that in all prosecutions, the accused should have the benefit of a speedy trial; should be informed of the nature and cause of the accusation; should be confronted with the witnesses against him, and should have compulsory process for obtaining witnesses, and the assistance of counsel; that certain guaranties against oppression of person and spoliation of prop-

erty should not be violated, such as that no person should be deprived of life, liberty, or property, without due process of law, and that private property should not be taken for public use without just compensation; that the enumeration in the Constitution of certain rights, should not be construed to deny or disparage others retained by the people; and that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, were reserved to the States, respectively, or to the people. These were all restraints upon the general Government. Had the population of the United States continued as sparse as when the Constitution was formed, and the means of more rapid intercourse between the States had not been invented, it is possible that further amendments would not have been demanded. But the immense development of the resources of the country, the great increase of population, the constant intercourse between the States by steamer, railway, and telegraph, changed the business and commercial relations of the States to each other, and led the people of one section to seek a closer union, and to desire a greater authority to be exercised by the central Government, whilst the peculiar institutions of the other section, and the different industries they developed, led its people to desire to limit, rather than to strengthen the central authority. Differences of opinion in matters of internal policy, and the estrangement engendered by controversies growing out of the existence of slavery in some of the States, ultimately culminated in civil war. Men then saw that danger was to be apprehended in a direction opposite to that which led to the original amendments. Restraints upon the power and action of the States were, therefore, suggested, and to impose them and to abolish slavery, the great cause of the civil conflict, the new amendments—the Thirteenth, Fourteenth, and Fifteenth—were adopted. "While, therefore," to quote the language of an admirable writer and eminent jurist, Judge Cooley, "the first amendments were for the purpose of keeping the central power within due limits, at a time when the tendency to centralization was alarming to many persons, the last were adopted to impose new restraints

on State sovereignty, at a time when State powers had nearly succeeded in destroying the national sovereignty. Of these amendments, it may be safely affirmed, that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the States the surrender of no power which any free government should ever employ." It would tend, therefore, to defeat the great purpose of the late amendments, if to any of them we should give the narrow construction for which counsel contend.

Private corporations are, it is true, artificial persons, but with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this State they are formed under general laws; and the Civil Code provides that they "may be formed for any purpose for which individuals may lawfully associate themselves." Any five or more persons may by voluntary association form themselves into a corporation. And as a matter of fact, nearly all enterprises in this State, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads, and cross mountains and deserts with them; they erect churches, colleges, lyceums, and theatres; they set up manufactories and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accident on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing which is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations. There are over five hundred corporations in this State; there

are thirty thousand in the United States, and the aggregate value of their property is several thousand millions.* It would be a most singular result if a constitutional provision, intended for the protection of every person against partial and discriminating legislation by the States, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think that it is well established by numerous adjudications of the Supreme Court of the United States, and of the several States, that whenever a provision of the Constitution, or of a law, guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the Courts will always look beyond the name of the artificial being to the individuals whom it represents.

The case of the *Society for the Propagation of the Gospel in Foreign Parts* v. *The Town of New Haven*, reported in the 8th of Wheaton, furnishes an apt illustration of this doctrine. The sixth article of the treaty of peace with Great Britain of 1783 provided that there should be "no future confiscations made nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty, or property." An English corporation claimed the benefit of this article with reference to certain lands in Vermont granted to it before the revolution, which the Legislature of that State had undertaken to give to the town where they were situated. It was contended that the treaty only applied to natural persons; that it did not embrace corporations, because they were not persons who could take part in the war, or could be considered British subjects, but the position was held to be untenable. The Court, speaking through Mr. Justice Washington, said that the argument proceeded upon an incorrect view of the subject, and referred to the case of *The United States* v.

*The number of corporations here stated is much less than the number actually existing. There are over five thousand corporations in California alone.

Deveaux (5 Cranch, 86), to show that the Court, when necessary, will look beyond the name of a corporation to reach and protect those whom it represents.

The Constitution, in defining the judicial power of the United States, declares that it shall extend to "controversies between citizens of different States," and in the case referred to by Mr. Justice Washington, the question arose whether a corporation composed of citizens of one State could sue in the Circuit Court of the United States a citizen of another State, and it was held that it could. In deciding the question, the Court, speaking through Chief Justice Marshall, said: "However true the fact may be that the tribunals of the State will administer justice as impartially as those of the Nation to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens or citizens of different States are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. Such has been the universal understanding on the subject. Repeatedly has this Court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."

The same point was presented in another form in the case of *Marshall* v. *Baltimore and Ohio Railroad Company*

(16 How. 326). There the question was whether a citizen of one State could sue in the Circuit Court of the United States a corporation of another State, and a similar conclusion was reached. After referring to the clause of the Constitution, extending the judicial power of the United States to controversies between citizens of different States, the Court proceeded to consider the objections urged to treating a corporation as a citizen, so far as it might be necessary to protect the corporators: "A corporation," observed Mr. Justice Grier, speaking for the Court, "it is said, is an artificial person, a mere legal entity, invisible and intangible. This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'cannot be a citizen' is a logical conclusion from the premises, which cannot be denied. But a citizen who has made a contract, and has a controversy with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners."

"The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a fictitious or collective name. But these important faculties, conferred on them by State legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism which deals subtly with words and names without regard to the things or persons they are used to represent."

The Fifth Amendment to the Constitution declares that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of

war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

From the nature of the prohibitions in this amendment, it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves; and, therefore, it might be said with much force that the word person there used in connection with the prohibition against the deprivation of life, liberty, and property without due process of law, is in like manner limited to a natural person. But such has not been the construction of the Courts. A similar provision is found in nearly all of the State Constitutions; and everywhere, and at all times, and in all Courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is concerned, to corporations. And this has been because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense; and whatever affects the property of the corporation necessarily affects the commercial value of their interest. If, for example, to take the illustration given by counsel, a corporation created for banking purposes acquires land, notes, stocks, bonds, and money, no stockholder can claim that he owns any particular item of this property; but he owns an interest in the whole of it which the Courts will protect against unlawful seizure or appropriation by others, and on the dissolution of the company he will receive a proportionate share of its assets. Now, if a statute of the State takes the entire prop-

erty, who suffers loss by the legislation? Whose property is taken? Certainly the corporation is deprived of its property; but, at the same time, in every just sense of the constitutional guaranty, the corporators are also deprived of their property.

The prohibition against the deprivation of life and liberty in the same clause of the Fifth Amendment does not apply to corporations, because, as stated by counsel, the lives and liberties of the individual corporators are not the life and liberty of the corporation.

Nor do all the privileges and immunities of citizenship attach to corporations. These bodies have never been considered citizens for any other purpose than the protection of the property rights of the corporators. The *status* of citizenship, entitling the citizen to certain privileges and immunities in the several States, does not belong to corporations. The special privileges which citizens acquire by becoming incorporated in one State cannot, therefore, be exercised in another State without the latter's consent, as was held in *Paul* v. *Virginia*, 8 Wall. 168, although such consent will generally be presumed in the absence of positive prohibition.

Decisions of State Courts, in harmony with the views we have expressed, exist in great numbers. But it is unnecessary to cite them. It is sufficient to add that in all text-writers, in all codes, and in all revised statutes, it is laid down that the term person includes, or may include, corporations, which amounts to what we have already said, that whenever it is necessary for the protection of contract or property rights, the Courts will look through the ideal entity and name of the corporation to the persons who compose it and protect them, though the process be in its name. All the guaranties and safeguards of the Constitution for the protection of property possessed by individuals may, therefore, be invoked for the protection of the property of corporations. And as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the Fourteenth Amendment, so no legislation imposing such unequal burdens upon the prop-

erty of corporations can be maintained. The taxation, therefore, of the property of the defendant upon an assessment of its value, without a deduction of the mortgage thereon, is to that extent invalid.

If there were no other objection to the assessment we might perhaps order judgment for the amount of taxes due upon the valuation of the property, after deducting therefrom the amount of the mortgage; but there is another objection of equal significance, which goes to the validity of the whole assessment. No opportunity was afforded to the defendant to be heard respecting it before the State Board of Equalization. It was made by the Board under the tenth section of Article XIII of the Constitution, which declares that "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, towns, townships and districts."

Other articles of the Constitution, and laws supplementing their directions, provide for the assessment by county officers of all property except "the franchise, roadway, roadbed, rails, and rolling stock" of railroads operated in more than one county, for a hearing by property-holders respecting the assessment, and for its equalization by county boards. Ample security is thus afforded to individuals against erroneous and arbitrary assessments. But the assessment of the property mentioned of railroads operated in more than one county is placed entirely with the State Board. In *People* v. *Supervisors of Sacramento County*, the Supreme Court of the State said that: "It is the manifest intent of the Constitution that the valuation of the railroad property mentioned in Section 10 of Article XIII shall be finally fixed and determined by the State Board of Equalization. The State Board has the exclusive power to assess and equalize its value. Thus the Constitution furnishes a

system for the assessment of railroads operated in more than one county, which is separate and distinct from that provided for the assessment of other property;" and, again, "The portion of the section quoted (the portion above) is clearly self-executing. We are at a loss to imagine how any statute could make the duty of the State Board any clearer than does this distinct and positive mandate of the Constitution. If any doubt could possibly be built upon the words cited, it would be dispelled by the first clause of the same section: 'All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law.' Thus, by the very language of the Constitution, all other but the railroad property mentioned must be assessed by local assessors, in the manner prescribed by statute. The railroad property must be assessed in the manner prescribed by the section of the Constitution, that is, by the State Board, without the aid of statute." (Pacific Coast Law Journal, vol. 8, p. 103.)

The Political Code provides that the assessment shall be made by the State Board on or before the first Monday in May of each year; that the President, Secretary, Cashier, or Managing Agent, or such officer of the corporation as the Board may designate, shall furnish to the Board, on or before the first Monday of April of the year, a statement signed and sworn to by him, showing in detail the whole number of miles of railway owned, operated, or leased in the State by the corporation, and the value thereof per mile, and all its property of every kind located in the State, the number and value of its engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating or repairing the railway in the State, and on railways which are parts of lines extending beyond its limits, the amount of the rolling stock in use during the year, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in the State, and such other facts as the Board may in writing require; and that if the officer, or officers, designated fail to make and furnish such statement, the Board shall proceed to assess the prop-

erty, and the valuation fixed shall be final and conclusive. The law also provides that the property shall be assessed at its actual value; that the assessment shall be made of the entire railway in the State, including the right of way, road-bed, track, bridges, culverts, and rolling stock; that the State Board shall transmit to the County Assessor of each county through which the railway runs a statement showing the length of its main track within the county, and its assessed value per mile as fixed by a *pro rata* distribution per mile of the assessed value of the whole property; that this statement shall be entered on the assessment roll of the county, and that at their first meeting after its receipt by the County Assessor, the Board of Supervisors of the county shall cause an order to be entered in the proper record book stating the length of the main track, and the assessed value of the railway lying in each city, town, township, school district, or lesser taxing district in the county, through which the railway runs, as fixed by the State Board, which shall constitute the taxable value of the property for taxable purposes in the district, and that such property shall be taxed at the same rates as the property of individuals.

We have no doubt that further legislation might have been adopted providing for notice to the company, and a system of procedure by which it might have been heard respecting the assessment. We do not understand that the Supreme Court of the State intended by the decision cited, to hold that the 10th Section of the XIIIth Article is self-executing, except to the extent that it vests complete power in the State Board to make the assessment of the property; not that legislation may not be had providing for the mode in which the powers of the Board shall be exercised. Indeed, the concluding section of the article authorizes any legislation necessary to give effect to its provisions. Unfortunately, no such legislation has been had. The attempted legislation failed, because it did not receive in the Legislature the constitutional majority, as is clearly shown by the Circuit Judge in his opinion. It is unnecessary to go over the ground he has completely covered.

The presentation to the State Board by the corporation of

a statement of its property and of its value, which it is required to furnish, is not the equivalent to a notice of the assessment made and an opportunity to be heard thereon. It is a preliminary proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. No hearing upon the statement presented is allowed, and when the assessment is made the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners, than the filing of a complaint in Court can dispense with the right of the suitor and his contestant to be there heard.

There being, then, no provision of law giving to the company notice of the action of the State Board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property, in the enforcement of the tax levied according to the assessment, be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action. And the injustice is strikingly apparent when the property consists of the great number of particulars which go to make up the taxable estate of a railroad company, requiring for any just estimate of their value accurate knowledge upon a multitude of subjects, not usually possessed without special study. We cannot assent to any such doctrine. It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property, without an opportunity of being heard against the proceeding. The principle is as old as *Magna Charta*, and is embodied in all the State Constitutions, and in the Fourteenth Amendment of the Federal Constitution. The provision in this amendment is in the form of an interdict upon

the States: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." And by *due* process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but *due* process. If it touched life or liberty, it would be wanton punishment, or rather wanton cruelty; if it touched property, it would be arbitrary exaction. It is significant that the guaranty against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law, by those principles which are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation; and, in some cases, it may be given by statute; but given it must be in some form. If life and liberty are involved, there must be a regular course of judicial proceedings; so, also, where title or possession of property is in contention. But in the taking of property by taxation, the proceeding is more summary and stringent. The necessities of revenue for the support of government will not admit of the delays attendant upon judicial proceedings in the Courts of justice. The statute fixes the rate of taxation upon the value of the property, and appoints officers to estimate and appraise the value. Due process of law in the proceeding is deemed to be pursued when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by

the officers. Notice to him will be deemed sufficient, if the time and place of hearing be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted; and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding.

In *Davidson* v. *New Orleans* the Supreme Court of the United States assumed this position to be unquestionable. In that case an assessment levied on certain real estate in New Orleans, for draining the swamps of that city, was resisted on the ground that the proceeding deprived the owners of their property without due process of law; and the Court refused to disturb it, for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the Courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition which would be at once perspicuous, comprehensive, and satisfactory, the Court, speaking through Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case: "That whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community; and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary Courts of justice, with notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case; the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." (96 U. S. 104.)

In *Stuart* v. *Palmer* the meaning of these terms is elaborately considered by the Court of Appeals of New York, with reference to numerous adjudications on the subject. In that case a law of the State imposed an assessment on certain real property for a local improvement, without notice to the owner, and a hearing, or an opportunity to be heard by him, and the Court held that it had the effect of depriving him of his property without due process of law, and was therefore unconstitutional. Mr. Justice Earl, speaking for the Court, said: "I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing, or an opportunity of hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing, and an opportunity to be heard: It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done. The Legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." And again, that: "No case, it is believed, can be found in which it was decided that this constitutional guaranty" (against depriving one of his property without due process of law) "did not extend to cases of assessments; and yet we may infer from certain *dicta* of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case,

against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment." (74 N. Y. 188 and 195.) We concur fully in the views thus forcibly expressed.

It remains to consider the last position of counsel, that the provisions of Article XIII of the Constitution of the State, as to the taxation of railroad property, are to be treated as conditions upon the continued existence of railroad corporations. On the hearing this position seemed to us to possess some force, but on careful consideration its supposed force is dissipated. The argument is, that on the original creation of the corporations the State might have imposed any conditions whatever as to the manner and the amount in which the property should be taxed; that under the reserved power of amendment of the law creating the corporations, the State could at any time afterwards impose such a condition; that the new Constitution, in continuing the defendant and other railroad corporations in existence, and at the same time authorizing the taxation of their property upon a valuation different from that at which the property of individuals is assessed, imposed that condition upon them, and that the subsequent exercise of its franchises by the defendant implies an assent to such condition.

There are two answers to this argument. In the first place, Article XIII is not intended to make any change in the powers or rights of corporations under the laws of the State. It treats entirely of revenue and taxation, and of the rules which shall govern the assessment of the property of individuals and of railroad and other *quasi* public corporations. It is in another article that provisions are made for the control of railroad corporations; and the duties and responsibilities of corporations generally, and the power of the State over them, are declared.

In the second place, the State, in the creation of corporations, or in amending their charters, or rather in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them

when created, or by amendment, from the guaranties of the Federal Constitution. It cannot impose the condition that they shall not resort to the Courts of law for the redress of injuries, or the protection of their property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law; or that they shall submit without objection to unequal and oppressive burdens, arbitrarily imposed upon them; that, in other words, over them and their property, the State may exercise unlimited and irresponsible power. Whatever the State may do, even with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution. It may confer by its general laws upon corporations certain capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications; and impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation; it cannot be taken without due process of law; nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances.

The State grants to railroad corporations formed under its laws a franchise, and over it retains control, and may withdraw or modify it. By the reservation clause it retains power only over that which it grants; it does not grant the rails on the road; it does not grant the depots along side of it; it does not grant the cars on the track nor the engines which move them; and over them it can exercise no power, except such as may be exercised through its control over the franchise, and such as may be exercised with reference to all property used by carriers for the public. The reservation of power over the franchise—that is, over that which is granted—makes its grant a conditional or revocable con-

tract, whose obligation is not impaired by its revocation or change. The Supreme Court established in the Dartmouth College case that the charter of a private corporation is a contract between the corporators and the State, and that it was, therefore, within the prohibition of the Federal Constitution against the impairment of contracts. To avoid this result the States have generally inserted clauses in their Constitutions reserving a right to repeal, alter, or amend charters granted by their Legislatures; or to repeal, alter, or amend the general laws under which corporations are allowed to be formed. The reservation relates only to the contract of incorporation, which without such reservation would be irrepealable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the Supreme Court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts. The property of the corporation, acquired in the exercise of its faculties, is held independently of such reserved power, and the State can only exercise over it the control which it exercises over the property of individuals engaged in similar business.

The case of *Detroit* v. *Detroit and Howell Plank Road Company*, in the Supreme Court of Michigan, is in point on both of the propositions stated. An Act of the Legislature of the State, amending the charter of the company, required it to remove without the limits of the city of Detroit a toll-gate on its road, then within the limits. The effect of the Act was to take from the company about two and a half miles of its road, upon which it collected tolls. The Act under which the company was incorporated reserved a power in the Legislature to repeal and amend it at any time, and the question was whether, under this reservation, the Legislature could require the removal of the toll-gate out of the city, and it was held that it could not. Ordinarily a law requiring the removal of a toll-gate from one place to another on a road would be a mere police regulation, but here it was something more; it deprived he company of compensation for the use of its road within the city limits—

that is, for a large part of the travel over it. The Court, speaking through Mr. Justice Cooley, observed that there were cases in which amendments to charters having some resemblance to this had been sustained; and cited several which involved a mere police regulation, such as requiring a railroad company to build a station-house and stop its trains at a certain locality; to permit and provide for the crossing of its track; and to unite with others in a common passenger station for trains entering a city. "But," the Court added, "there is no well-considered case in which it has been held that a Legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany etc. R. R. Co.* v. *Brownell* (24 N. Y. 345) is an illustration. It was there decided that although the Legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with the provision for compensation. The decision was in accord with that in *Commonwealth* v. *Essex Co.* (13 Gray, 239, 253), in which, while the power to alter, amend, or repeal the corporate franchises was sustained, it was at the same time declared that 'no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' The same doctrine is clearly asserted in *Railroad Company* v. *Maine* (96 U. S. 499), and is assumed to be unquestionable in the several opinions delivered in the *Sinking Fund Cases.* (99 U. S. 700.)

"But for the provision of the Constitution of the United States, which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be, if unrestrained by express constitutional limitations and with the powers which it would then possess. It might, therefore, do what it would be admissible for any constitu-

tional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the Government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State, it is enough that it has become private property, and it is then protected by the 'law of the land.'" (43 Mich. 140–147.)

We have already extended this opinion to a great length, and we do not think it necessary or important to notice other positions urged by counsel, with great learning and ability, against the validity of the taxes for which the present action is brought. We are satisfied that the assessment, upon which they were levied, is invalid and void, and judgment must be accordingly entered on the demurrer for the defendant, and, by stipulation of parties, the judgment must be made final.

SAWYER, Circuit Judge, concurring. The facts of this case are fully stated by Mr. Justice Field, and need not be repeated here. The questions presented are of the gravest character, and of the utmost importance to the people of California. While I concur in the conclusions, and in the line of argument adopted by my associate, I shall also state, as briefly as I reasonably can, considering the gravity of the questions discussed, my views upon the points involved.

1. In my judgment the word "person," in the clause of the fourteenth amendment to the national constitution, "No state shall * * * deprive any *person* of life, liberty, or property, without due process of law, nor deny to any *person* the equal protection of the laws," includes a private corporation. It must, at least, through the corporation,

include the natural persons who compose the corporation, and who are the beneficial owners of all the property, the technical and legal title to which is in the corporation, in trust for the corporators. The fact that the corporators are united into an ideal legal entity, called a corporation, does not prevent them from having a right of property in the assets of the corporation, which is entitled to the protection of this clause of the constitution. Nor does the intervention of this artificial being between the real beneficial owners and the state, for the simple purpose of the convenient management of the business engaged in, enable the state, by acting directly upon the legal entity, to deprive the real parties beneficially interested of the protection of these important provisions. In the language of Mr. Pomeroy, one of the counsel, which I adopt: "Whatever be the *legal* nature of a corporation as an artificial, metaphysical being, separate and distinct from the individual members, and whatever distinctions the common law makes, in carrying out the technical legal conception, between property of the corporation and that of the individual members, still, in applying the fundamental guaranties of the constitution, and in thus protecting rights of property, *these metaphysical and technical notions must give way to the reality.* The truth cannot be evaded that, *for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators.* A state act depriving a business corporation of its property without due process of law does, *in fact, deprive the individual corporators of their property.* In this sense, and within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons, or corporations, and natural persons."

This principle is recognized, and the question settled for all time in an early case by Chief Justice Marshall, in which he says: "Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien, or a citizen; but the per-

sons whom it represents may be the one or the other; and the controversy *is, in fact and in law, between those persons suing in their corporate character* by their corporate name for a corporate right, *and the individuals against whom the suit may be instituted. Substantially and essentially the parties in such a case,* where the members of the corporation are aliens or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals." (*Bank of United States* v. *Deveaux*, 5 Cr. 87.) It is upon this principle that the national courts have ever since entertained jurisdiction, on the ground of citizenship, of the corporators in cases wherein corporations are the parties to the record. The cases in the supreme court upon this point are numerous, and too familiar to require further citation. In *Society etc.* v. *New Haven*, 8 Wheat. 464–489, it was held that a corporation was protected under the sixth article of the treaty with England of 1783, which reads: "There shall be no confiscations made, nor any prosecutions commenced against any *person* or *persons* for or by reason of the part which he, or they, may have taken in the present war, and that no *person* shall, on that account, suffer any future loss or damage, either in person, liberty, or property," etc. The word "person," in the civil rights act of congress of April 20, 1870 (17 Stat. 13), was held on the circuit to include a corporation. (*North West Fert. Co.* v. *Hyde Park*, 3 Biss. 481.) In *Railroad Company* v. *Richmond*, 96 U. S. 529, the supreme court assumes that a corporation is included in the word "person," as thus used in the fourteenth amendment.

The word "person" is, unquestionably, much broader in its signification than the word "citizen," and the change from the word "citizen," in the first clause of the section, to the word "person," of so much larger import in the last, must have been well considered; and have been intended to extend the shield of the constitution to all cases which might require the protection of this wholesome and greatly needed guaranty. There is nothing in the context to indicate a purpose to limit the meaning of the word person to

a narrower sense than the word ordinarily and naturally imports; or to make the application of the provision partial only. To exclude corporations from its import, would be to leave, perhaps, at this day, the far larger portion of the vast capital of the country employed in great enterprises, either commercial, manufacturing, mining, or otherwise, beyond the pale of its protection. There is no good reason for excluding the property of corporations from the protection extended to other property. It is subject to all the burdens, and it should be entitled to all the immunities of other property. It is, at last, the property of natural persons. The provision is protective and remedial, not punitive in character, and should, therefore, be *liberally*, *not strictly*, construed. No restriction should be put upon the terms not called for by the exigencies of the case, or by the public interests; and it must be manifest that the public interest requires that the broadest signification should be adopted.

Blackstone treats of corporations under the head of Rights of Persons—chapter XVIII, under this head, being devoted to the subject. He says: "Persons, also, are divided by law into either natural persons or artificial," giving a definition of each. (Book I, 123.) So, also, does Kent (2d vol. 316). In *United States* v. *Amedy* (11 Wheat. 412), wherein a person was indicted, under an act of congress, for destroying a vessel belonging to a corporation, the supreme court held that a corporation is a person within the meaning of the act. The court, among other things, says: "The mischief intended to be reached by the statute is *the same*, whether it respects private or corporate *persons*. *That corporations are in law, for civil purposes, deemed persons, is unquestionable.*" And the court in this case holds the same for criminal purposes also; and in criminal cases statutes are *strictly* construed. So in regard to the provisions of the fourteenth amendment under consideration, "the *mischief intended to be reached*" by the amendment "*is the same, whether it respects private or corporate persons.*" (See also cases cited in the opinion.) The authorities to a similar effect are numerous. (See, as examples, *People* v.

Ins. Co., 15 Johns. 588; *Planters' Bank* v. *Andrews*, 8 Porter, 404; Kyd on Corp. 15; *Douglass* v. *Pacific Mail Steamship Co.*, 4 Cal. 304; *State* v. *Nashville University*, 4 Humph. 166.) There are many other cases affording support, more or less direct, to this view.

In *Insurance Co.* v. *New Orleans* (1 Woods, 85), it was held on the circuit that a corporation is not embraced in the word "person," as used in the amendment under consideration, and the supreme court of California, upon the authority of that case, made a similar ruling in *Central Pacific Railroad Co.* v. *The State Board of Equalization* (8 P. C. L. J. 1155). But notwithstanding their high character for ability, and my respect for the decisions of the judges expressing that opinion, I am compelled, both upon reason and authority, to think that the other is the better view. Again, with respect to corporate property, I adopt the language of counsel, which expresses my view accurately and clearly: "*The property of the corporation is in reality the property of its individual corporators.* A state statute depriving a corporation of *its* property does deprive the *individual corporators* of *their* property. These clauses of the fifth and fourteenth amendments, and the similer clauses of the state constitution, apply, therefore, to private corporations, not alone because such corporations are 'persons,' within the meaning of that word, *but also because statutes violating their prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons.* In applying and enforcing these constitutional guaranties, *corporations cannot be separated from the natural persons who compose them.*" The decision in *Dodge* v. *Woolsey* (18 How. 331), which establishes the right of stockholders to maintain a suit against the directors of the corporation and state officers to restrain the payment by the one, and the collection by the other, of a tax illegally assessed against the corporation, rests upon this principle. See, also, *Marshall* v. *Baltimore and Ohio Railroad Co.* (16 How. 327). But a corporation itself is, in my judgment, a "person," within the meaning of the constitutional provision in question. Such has been the ruling in all cases under

statutes containing the word "person," unless the context clearly indicated a more limited signification.

2. I shall not spend much time in discussing the question whether the fourteenth amendment applies only to the African race. Undoubtedly the negro furnished the immediate occasion and motive for the adoption of the amendment; but its benefits could not have been intended to be limited to the negro. The protection afforded is as important to others as to him, as is clearly shown by experience under this provision. A whole race, not African, large numbers of whom came to our shores under the solemn guaranties of stipulations in a treaty suggested and sought, and in great part framed by ourselves, to promote our then supposed interests, were among the first to invoke this very provision of the fourteenth amendment to protect them, under the word "person," in the right to earn an honest living by honest labor; and its protecting power was not invoked in vain. (*Parrott's Chinese Case*, 6 Saw. 349; *In re Ah Chong; Chinese Fisherman Case*, 6 Saw. 451.) Who, in view of past experience, shall say there was no occasion to extend the signification of the word "person" beyond the negro? And are all other races, including our own, to be now withdrawn from its protecting power by so narrow and unnatural a construction? I apprehend not. If the line cannot be drawn at the negro, then no other can be adopted that will not embrace every human being in his individual character, or in his legal association with his fellows for the more convenient administration of his property, and more successful pursuit of happiness. I apprehend that it would have struck the world with some astonishment, when this amendment was proposed to the people of the United States for adoption, if it had read: "Nor shall any state deprive any person *of the negro race* of life, liberty, or property, without due process of law; nor deny to any person *of the negro race* within its jurisdiction the equal protection of the laws." Yet so it must, in effect, be read, if its operation is to be limited to that race. The rights of the negro are, certainly, no more sacred or worthy of protection than the rights of the Caucasian or other races;

and the security of the rights of corporations, and, through them, the rights of the real parties—the corporators—is as of great public importance as the security of any other private interest.

3. Does the assessment in question, made in strict pursuance of the provisions of the Constitution of California, violate that clause of the Fourteenth Amendment of the National Constitution which says that no state "shall deprive any person of life, liberty, or property, *without due process of law*"? The provision of the state constitution under which the assessment was made is as follows: "The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of roadway laid in such counties, cities and counties, cities, towns, townships, and districts." This is the only provision affecting this question. To take one's property by taxation is to take or deprive one of his property; and if not taken in pursuance of the law of the land—in some due and recognized course of proceedings, based upon well-recognized principles in force before, and at the time this clause was first introduced into the various constitutions and the legislation of the country—is to take it "without due process of law." The signification of these words has been the subject of judicial consideration and discussion in a vast number of cases; and their import has been determined to be the same as that of equivalent phrases in Magna Charta, from which the principle adopted was derived.

I shall not attempt to give an accurate definition of the terms "due process of law," applicable to all cases. It is not necessary for the determination of this case to do so. It is enough to say that it has been settled by judicial decision, that whether the proceeding be judicial, administrative, or legislative, if it affects life or liberty, or takes property directly, or imposes a charge which becomes the

basis of taking property, some kind of notice, or opportunity to be heard on his own behalf and to defend his rights, given to the person whose life or liberty is to be affected, or whose property is to be taken or burdened with the liability, is an indispensable element—an essential ingredient—of "due process of law." No one, I apprehend, would for a moment contend that a man's life or his liberty could be legally taken away without notice of the proceeding, or without being offered an opportunity to be heard; or that a proceeding whereby his life or liberty should be forfeited, or permanently affected, without notice or opportunity to be heard in his own defense, could, by any possibility, be by "due process of law." In such cases there could be no just conception of "due process of law" that would not embrace these elements of notice and opportunity to be heard. Any conception excluding these elements would be abhorrent to all our ideas of either law or justice. If these elements must enter into and constitute an essential part of due process of law, in respect to life and liberty, they must also constitute essential ingredients in due process of law where property is to be taken; for the guaranty in the constitution is found in the same provision, in the same connection, and in the identical language applicable to all. One meaning, therefore, cannot be attributed to the phrase, with respect to property, and another with respect to life and liberty.

Having stated the principle, which I conceive to be established by an unbroken line of authorities, I shall refer to some of them. One of the latest and most instructive cases upon the subject was recently decided by the court of appeals of the state of New York, from which I shall extract a passage, which I adopt, as expressing my own views and presenting the question in a very clear and satisfactory light. It involved the validity of an assessmant for a public street improvement, and but one question, which was decisive of the case, was examined or determined. The question was as to the validity of *the law* under which the assessment was made. The court, by Mr. Justice Earl, says: "The latter assessment could be made without any

notice to, or hearing of, any person. The law requires no notice, and a provision for notice cannot be implied. Upon the assumption that the law was valid, there was ample authority for the commissioners to make the assessment without any notice or hearing." (*Stuart* v. *Palmer*, 74 N. Y. 186.) The judge proceeds: "I am of the opinion that the constitution sanctions no law imposing such an assessment without a notice to and a hearing, or an opportunity of a hearing, by the owners of the property to be assessed. *It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require a notice to them and give them a right to a hearing, and an opportunity to be heard.* It matters not upon the question of the constitutionality of such a law that the assessment has in fact been fairly apportioned. *The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done.* The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." (Id. 188.)

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"*The legislature can no more arbitrarily impose an assessment for which property may be taken or sold, than it can render a judgment against a person without a hearing.* It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these without due process of law, has its foundation in this rule. *This provision is the most important guaranty of personal rights to be found in the federal or state constitutions.* It is a limitation upon arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to any judicial proceedings, but extends to every case which may deprive a citizen of his life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. This great

guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights." (Id. 190.) * * * * *

"*No case, it is believed, can be found in which it was decided that the coustitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering.* It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment." (Id. 195.)

Much more is worth quoting, but it would extend this opinion to an unreasonable length.

Thus it is determined, in the case cited, that a party is not only entitled to notice and an opportunity to be heard, but that the law, or constitution itself, must expressly provide for notice. This decision was approved by the supreme court of California in October last, in *Mulligan* v. *Smith*, involving the validity of a tax. (8 P. C. L. J. 499.) Said McKinstry, J.: "In my opinion, the statute provides no notice or process by means of which the property owners can be subjected to the judgment of the county court. *The act is, therefore, void;*" citing *Stuart* v. *Palmer*, *supra;* Cooley on Taxation, 266, and other cases. And McKee, J., in the same case, said: "It is a principle which underlies all forms of government *by law*, that a citizen shall not be deprived of life, liberty, or property without due process of law. The legislature has no power to take away any man's property, nor can it authorize its agents to do so, *without first providing for personal notice to be given to him, and for a full*

opportunity of time, place, and tribunal, to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature."

In *Patten* v. *Green*, 13 Cal. 329, Mr. Justice Baldwin—all the justices, including Mr. Justice Field, concurring in the opinion—said: "We think it would be a dangerous precedent to hold, that an absolute power resides in the supervisors to tax land as they may choose, without giving *any notice to the owner*. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power." The raising of the tax by the board of equalization was held void for want of notice. Mr. Webster, in the Dartmouth College case, defined due process of law, or "the law of the land," as "the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." He adds: "Everything which may pass under the form of an enactment is not 'the law of the land.'"

In *Cooper* v. *Board of Works*, 108 Eng. Com. L. 181, in which was in question the action of the board of public works, in pursuance of a statute which did not require notice, Willes, J., said: "I apprehend that a tribunal, which is by law invested with power to *affect the property* of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds. And that that rule is of universal application, and founded upon the plainest principles of justice." In the same case, Byles, J., said: "The judgment of Mr. Justice Fortescue, in Doctor Bentley's case, is somewhat quaint, but is very applicable, and has been the law from that time to the present." He says: "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he called upon him to make his defense. 'Adam, where art thou? Hast thou eaten of the tree

whereof I commanded thee that thou shouldest not eat?" (See also *Philadelphia* v. *Miller*, 49 Pa. 448; *Matter of Ford*, 6 Lans. 92; *Overing* v. *Foote*, 65 N. Y. 263; *Westervelt* v. *Gregg*, 12 Id. 209; Cooley on Const. Lim. 355; *Butler* v. *Sup. Sag.*, 26 Mich. 22, 29; Sedgwick on Stat. and Const. Construction, Pomeroy's ed., 474 *et seq.*, and notes; Cooley on Taxation, 266, 267.) In *Davidson* v. *New Orleans*, 96 U. S. 97, it was not questioned, but assumed, that the party taxed must have an opportunity to be heard, and the case was decided upon that theory.

In my judgment, the authorities establish, beyond all controversy, that somewhere in the process of assessing a tax under a law, or a state constitution, at some point before the amount of the assessment becomes finally and irrevocably fixed, the statute, or the state constitution, must provide for notice to be given to the owner of the property taxed, and an opportunity be afforded to make objections and to be heard upon them. In some form or manner he must be afforded an opportunity to defend his interests. In this case the constitution makes no provision for notice or a hearing, and the answer alleges that there was none, which is admitted by the demurrer.

4. On behalf of the plaintiff, what purports to be a statute passed March 14, 1881 (Statutes 1881, p. 84), is cited, which, it is insisted, supplements the constitution, and provides for a notice and hearing upon a petition filed within five days after the assessment is made upon a railroad. But it is claimed that, although published in the volume of statutes for the year 1881, as a statute, the bill never constitutionally passed, and that it is, consequently, no law. Section 15 of article IV of the constitution of California provides, "that on the final passage of all bills they shall be by yeas and nays upon each bill separately, and shall be entered on the journals, *and no bill shall become a law without the concurrence of a majority of the members elected to each house.*" Under section 5 of the same article the house consists of eighty members, of whom it would require forty-one to constitute a majority of the members elected to the house. Upon reference to the published journals of the

legislature, it appears that the bill in question passed the house and was sent to the senate, where it was amended by adding a long provision, being the very provision, if any there is, which gives the owners of railroads of the class in question, dissatisfied with the assessment, a right to file a petition "within five days after the assessment is made and entered of record on the books of the board," to have the assessment corrected, and providing for proceedings upon said petition. On March 4th, the house considered the senate amendment, and upon a call of the yeas and nays, as required by the constitution, *thirty-nine* members voted for the amendment, and *thirty-two* against it, there being four paired and not voting; thus the votes in favor of the amendment were two less than a majority of members elected to the house, and the bill failed. It does not appear that the bill "was read at length." The speaker declared that this was not the final action of the house, and that the amendment concurred in by a vote of thirty-nine yeas to thirty-two nays was adopted. An appeal having been taken from this decision of the chair, it was afterwards laid upon the table. Thereupon two members filed each a separate protest against the decision of the speaker and the certificate that the bill had passed, on the expressed ground that it did not receive the vote of a majority of the members elected to the house. All this appears upon the journal. If this was not the final action of the house, then, as there was no further action, the act never *finally* passed, even by the numbers indicated. (Assembly Journal, 24th session, 472–475.)

The bill, therefore, never was constitutionally passed, and never became a law. Whether the bill became a law is a question of law of which the court will take judicial notice. (*Sherman* v. *Story*, 30 Cal. 253; *Ottawa* v. *Perkins*, 94 U. S. 268; *Gardner* v. *The Collector*, 6 Wall. 509, 510; *Post* v. *Supervisors*, 105 U. S. 667.) Under the decisions of the courts upon constitutional provisions, in all respects similar to that in the present constitution of California, it is settled that the court, to inform itself, will look to the journals of the legislature. So the supreme court of the United States holds where it is so decided by the state courts in constru-

ing their own constitutions and laws. (See cases last cited.) I am not aware of any decision of the supreme court of California giving a different construction to the state constitution as it now stands. Unless this mode is adopted of resorting to the journals to ascertain whether a statute has been legally passed or not, experience and the number of cases that have already arisen under similar constitutional provisions demonstrate that the requirement of the constitution, that the vote shall be taken by yeas and nays and a majority of the members required to vote in the affirmative on the final passage of an act, would be of little avail. While we think the case of *Sherman* v. *Story* correctly decided under the constitution as it then was, we are of the opinion that the change in the constitution requires a change in the rule, and such seems to be the view of the supreme court of California in *Weil* v. *Kenfield*, 54 Cal. 111. When California adopted the provision in its present constitution, substantially as found in the constitution of Illinois, it must be deemed to have adopted with the provision the settled construction put upon it by the courts of the state from which it was taken. The leading cases upon the point are *Spangler* v. *Jacoby*, 14 Ill. 278; *Prescott* v. *Board of Trustees etc.*, 19 Id. 326; *Osborn* v. *Staley*, 5 West Va. 89, and the cases cited in *Sherman* v. *Story*, and in those from the United States supreme court. In this case there is something more than an omission in the journals, for it affirmatively appears what the vote was, and that the bill did not pass by the vote required by the constitution.

Statutory provisions have also been adopted, which appear to be designed to give effect to this change in the constitution. Section 255 of the political code requires the minute clerks of the senate and assembly to "keep a *correct* record of the proceedings of their respective houses." And sections 256 and 257 require the daily proceedings to be recorded *in the journals*, and that they "must be read by the secretary each day of meeting, and then be authenticated by the signatures of the president and speaker of the respective houses." Section 1875 of the code of civil procedure provides that "courts take judicial notice of the

following facts: * * * Public and private official acts of the *legislative*, executive, and judicial departments of this state and of the United States," etc. * * * "In all these cases the court may resort for its aid to appropriate books or documents of reference." Section 1888 provides, that "public writings are: 1. The written acts, or records of the acts, of the sovereign authority of official bodies and tribunals, and of public officers, *legislative*, judicial, and executive, whether of this state or of the United States," etc. And section 1918 provides, that "official documents may be proved as follows: * * * 2. The proceedings of the legislature of this state, and of congress, by the *journals* of those bodies respectively, or either house thereof, or by published statutes or resolutions." Thus the journals of the legislature are put upon the same footing as the statutes. We think there can be no doubt, under the constitution of the state, and these statutes, that we may look to the journals to see what action was in fact had with respect to any apparent law, as published in the volumes of the statutes of the state; and looking to the journals, it affirmatively appears that the act upon the statute book in question never did become a law.

Even if the act had passed, it is at least extremely doubtful whether the notice, or time for filing the petition, is sufficiently definite to be of any effect. The assessment, under the provision, might be made—even if the party is bound to notice the state of the record on the first Monday of May—the five days might elapse, and the assessment be transmitted to the county before the party assessed would know, under the law, that it had been made. All the acts of assessment may have transpired and the assessment become final before the first Monday of May. The board, however, is not required to make it before that day, although it might do so, and the party assessed can scarcely be expected to watch its proceedings, from day to day, before the time fixed by the law.

There being, then, no such statute as is relied on in existence, the validity of the assessment must rest alone upon the constitutional provision quoted and the act of 1880,

adding sections 3664 and 3665 to the political code; and neither provides for notice of any kind or for an opportunity to be heard in any stage of the proceedings. It was, therefore, made without due process of law, as we understand the meaning of that provision as used in the fourteenth amendment in question.

Section 3664 of the political code, as adopted in 1880, requires the president, or some other designated officer of the class of corporations in question, to furnish the state board of equalization, on or before the first Monday of April in each year, a detailed statement of the whole number of miles of road operated, the number of cars, amount of rolling stock, and their value, the gross earnings, and various other particulars; and requires the said board, on or before the first Monday in May, to assess the franchise, roadway, roadbed, rails, and rolling stock. It is urged, on the part of the plaintiff, that this provision furnishes sufficient notice and opportunity to be heard, to constitute due process of law on this point, within the meaning of the constitutional provision. In our judgment, this position is clearly untenable. This is simply a mode adopted for obtaining information as to the amount and general value of the property of the corporation, as a basis, in part, at least, for their future consideration and action in making the assessment. It is but a preliminary step, and not the assessment, or any part of the assessment. The board is under no obligation to adopt, either the statement as to what the property is, or its value. It may reject it altogether and adopt an entirely different basis. The party interested is entitled, at some point of the proceeding, to know what action the board takes, or proposes to take, and to an opportunity to be heard, as to its propriety, before the assessment becomes fixed and irrevocable. Other classes of property holders, also, are required to file a statement of their property under oath; yet in the scheme adopted for their assessment an opportunity to be afterwards heard is provided.

The constitutions of the state and nation provide that private property shall not be "taken for public use without just compensation." When parties can not agree, there

must be some mode provided for ascertaining the value of property so proposed to be taken for public use, under the sovereign right of eminent domain. Suppose a statute should provide a board, or even a court, to assess the value of property proposed to be taken under this power, for rail road purposes, or other public use, and should give the owner of the property no notice or opportunity to be heard, other than to require him at some time, say a month anterior to the consideration and determination of the amount to be paid, to furnish such board or court a similar statement as to the description and value of the property to that required by section 3664, which the party might do or omit to do; would a subsequent *ex parte* determination of the value by the board or court be in pursuance of due process of law within the meaning of the constitution? I apprehend that no court would sustain such a proceeding. I also think, that a taking for the purposes of taxation under such an assessment, without notice or opportunity to be heard, would be equally within the inhibitory provision relating to due process of law, and equally void.

The state supreme court has held the provision in the constitution of California, authorizing the state board of equalization to assess finally the railroads of the class in question, to be self-executing, requiring no legislation of any kind to carry it into full effect; also, that the provision is mandatory. (*San Francisco and North Pacific R. R. Co.*, 8 P. C. L. J. 1061.)

It is insisted by defendant that, this being so, it is incompetent for the legislature to add to or take from the requirements found in the constitution, and that the additional provision of section 3664, as adopted in 1880, is void. The view already expressed upon the section renders it unnecessary now to determine that question, although presented by the record and argued by counsel. It would seem, however, that there can be no constitutional objection to legislating upon details for the purpose of more effectually carrying out the scheme of the constitution, so far as the legislation is not inconsistent with any of its provisions. It is a general rule that a state legislature has all legislative

power not inhibited by the constitution, state or national. (*Southern Pacific Railroad Co.* v. *Orton*, 6 Saw. 186.)

This being so, it would seem that the legislature might supplement the constitutional provision by statutory provisions, intended to more perfectly protect the rights of the parties by other safeguards, which are not inconsistent with the constitutional provision. But as this is a question more properly belonging to the state courts, we do not deem it desirable to decide it now.

5. Is the provision of the state constitution, under which the assessment in question was made, in conflict with the provision of the fourteenth amendment to the national constitution, which provides that no state "shall deny to any person the equal protection of the laws"? The circuit justice has discussed this question so fully, and satisfactorily, that I shall have little to add. The provision is: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of such security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

Whatever the property, then, real or personal, mortgaged to secure a debt, the value of the debt so secured, in the case of everybody, *except* "*a railroad and other quasi public corporation*," is to be deducted from the value of the property mortgaged, and the value only of the property mortgaged, "less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof." That is to say, that, whatever the nature of the property, it shall be taxed to the real owner. But in the case of "a railroad or other *quasi* public corporation," there is to be no reduction of the value of the mortgaged property, and the whole is to be taxed to one party, whether he in reality *owns* the whole or not. In one case, if property is mortgaged to the extent of half its value, the owner is taxed upon one half the value, and the owner of the debt secured is taxed upon the other half. But in the other case, the owner of the legal title to the property is assessed and taxed upon the whole value of the property, and the other party, who is interested to the extent of one half, upon none. A., a natural person, has fifty thousand dollars in cash—all the property he has—and purchases of B., another natural person, a piece of real estate for one hundred thousand dollars, that being its actual value, paying one half down, and giving a mortgage for fifty thousand dollars, to secure the balance of the purchase money. The constitution in effect says—and in this instance such is the real actual state of facts—that A. and B. each has fifty thousand dollars in the property, one half not having been paid for by A., and each shall be assessed and pay a tax upon his own interest in it, amounting to fifty thousand dollars. A., in this instance, is worth only fifty thousand dollars, and if he pays taxes upon a larger amount, he pays taxes upon property he does not really own—upon property owned by somebody else. This seems to be a self-evident proposition.

C., "a railroad, or other *quasi* public corporation," also has fifty thousand dollars cash, and purchases of B., for its proper use, an adjoining piece of real estate for one hun-

dred thousand dollars, which is also its actual value, paying fifty thousand dollars, and giving a mortgage to secure the balance of the purchase money. In this case, as in the other, the actual interest of each in the property is fifty thousand dollars. They stand precisely upon the same footing in all particulars with reference to the property. C. has only fifty thousaud dollars in the property—it not having paid for the other half—and B. the rest. But in this case the constitution says that C. shall, nevertheless, be assessed for and pay taxes upon the whole property, double the amount he *really owns*, and B. shall not be required to pay anything. That is to say, that C. shall not only pay the tax on its own property, but the tax upon B.'s property; that money, to the amount of the tax assessed upon fifty thousand dollars belonging to B., shall be taken by the state or county from C., and appropriated to the use and for the benefit of B., to liquidate B.'s share of the public burdens. This sum, being so much more than C.'s share of the public burdens, and being in fact B.'s share, the result of the operation is, not only to take so much property from C., for public use, without compensation, but also to, arbitrarily, take it from C. and apply it to the use and benefit of another private party, B., without compensation. The result would be the same, whether the property of A., B., and C., thus situated and mortgaged, is land, a railroad operated in one or more counties, or any other kind of property.

Does a law which authorizes such proceedings—such discriminations—bear or press equally upon A. and C., or equally upon B. and C.? Is C. equally protected in its rights of property with A., or equally protected with B.? Although situated precisely alike with reference to their property, do they feel the pressure of the public burdens equally and alike? The question does not appear to me to admit of argument. Upon the very statement of the proposition, it seems to me to be self-evident that a law authorizing and *requiring* such proceedings, does not afford, but expressly *denies* the equal protection of the law. The constitution in the one case says that "the mortgage, deed of

trust, contract, or obligation" shall be "deemed and treated as an interest in the land affected thereby," which, in the cases supposed, together with the debt secured, it undoubtedly, in fact, is; but in effect the constitution says it is not so in the other case. Different kinds of property may require to be taxed in different forms and modes, in order to be equally taxed. And classifications of property, for purposes of taxation, should have reference to the just equality of burdens, so far as that is practically attainable. Classification should have reference to the different character, situation, and circumstances of the property, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made with mere reference to the nationality, color, or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation, or circumstances of the property. If the arbitrary discrimination and classification found in this case can be legally made under the national constitution, and the law of the land, then the subordinate state constitution, or law, can be so framed as to dispose of a man's rights in property of all kinds by arbitrary classification and definition, without regard to the real facts, circumstances, or condition of the property. A person may, by such subordinate statutory provisions, be classified and defined out of the equal protection of the laws, guaranteed by the national constitution; and if so, with reference to this provision, he can also be classified and defined out of uniformity in the operation of the laws in other particulars; out of the protection of due process of law, and of the provision forbidding a law impairing the obligation of contracts, or taking property for public use without just compensation; and, indeed, out of all the guaranties of the constitution, state or national. I am not arguing that property of all kinds may not be taxed where it is found, provided all owners are put upon the same footing; but in this case there is a personal liability sought to be enforced against the defendant for taxes not imposed upon others in like circumstances, without any means provided for reimbursement, such as are

applicable to others similarly situated, by the party who ought to pay the tax.

What constitutes the equal protection of the laws is well stated in *Ah Kow* v. *Nunan*, 5 Saw. 562; *In re Ah Fong*, 3 Id. 144; *Pearson* v. *Portland*, 69 Me. 278; *Portland* v. *Bangor*, 65 Me. 120; *Missouri* v. *Lewis*, 101 U. S. 22. See, also, *Live Stock etc.* v. *Crescent City Co.*, 1 Abb. 398; *Parrott's Chinese Case*, 6 Saw. 377. That inequality and different principles of taxation of persons similarly situated, as in this case, are violations of this provision seems to have been already determined by the supreme court of the United States. The civil rights act, as re-enacted in 1870, and, again, in the revised statutes, provides that "all persons within the jurisdiction of the United States shall have the same right in *every state* and territory * * * to the full and equal benefit of all laws and proceedings for the security of *persons and property*, as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, *taxes, licenses, and exactions of every kind, and to no other.*" (16 Stat. 144, sec. 16; R. S. 1977.)

The congress which passed this act embraced many of the members who were in the congress which framed and proposed the fourteenth amendment; and they may be supposed to be well informed as to the purpose and scope of that amendment. This act was passed in pursuance of the last clause of the amendment, as a part of the *appropriate legislation* to enforce its provisions. It is, therefore, a legislative construction, as to the scope of the provision inhibiting the states from denying to any person the equal protection of the laws. The United States supreme court gives the amendment a similar construction as to its scope. In *Strauder* v. *West Virginia*, the court says that sections 1977 and 1978 of the revised statutes "partially enumerate the rights and immunities intended to be granted by the constitution," and after quoting section 1977, as above set out, adds: "This act puts in the form of a statute what had been substantially ordained in the constitutional amendment. It was a step toward enforcing the constitutional provision." (100 U. S. 311.)

In *Ex parte Virginia*, the court, referring to *Tennessee* v. *Davis*, and *Strauder* v. *West Virginia*, said: "We held that the fourteenth amendment secures, among other civil rights to colored men, when charged with criminal offenses against a state, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the *equal rights* of all persons, and that any withholding it by a state *is a denial of the equal protection of the laws within the meaning of the amendment.* We held that such an equal right to an impartial jury trial, and such an immunity from unfriendly discrimination, are placed by the amendment under the protection of the general government, and guaranteed by it. We held, further, that this protection and this guaranty, as the fifth section of the amendment expressly ordains, *may be enforced by congress by means of appropriate legislation.*" (100 U. S. 345.)

If discrimination in fixing the qualifications of jurors inferentially violates the provisions of the fourteenth amendment, as denying the equal protection of the laws, it is not easy to perceive why discriminations in the assessment and collection of taxes, expressly made, are not equally so.

Thus it appears, that the supreme court regards the section quoted as within the scope of the fourteenth amendment, and the act provides that every person "shall be subject to like * * * *taxes, licenses, and exactions of every kind, and to no other*, as "white citizens," and this is held to be appropriate legislation to enforce the amendment. We have already seen that this defendant is subjected to taxes and exactions other than, and different from those imposed upon "white citizens." We have already held that the word "person," as to property rights, as used in the amendment in question, includes a corporation, and as used in the provision of the statute cited, it includes a corporation by express definition of the statute itself, which says, in terms: "In determining the meaning of the revised statutes * * * the word 'person' may extend and be applied to partnerships and corporations." (Page 1, tit. I, c. 1, sec. 1.)

The provision of the constitution of the state of California in question, therefore, violates the provision of the fourteenth amendment in denying to defendant the equal protection of the laws.

"An unconstitutional law is void, and is no law." (*Ex parte Siebold*, 100 U. S. 376.) "The constitution and laws of the United States are the supreme law of the land, and to those every citizen of the United States owes obedience, whether in his individual or official capacity. * * * The laws of the state, in so far as they are inconsistent with the laws of congress on the same subject, cease to have effect as laws." (Id. 392, 397.)

6. It is further urged on the part of plaintiff, that under the state constitution, the legislature is authorized to alter or repeal the laws under which corporations are formed—they cannot be properly called charters—and that this mode of taxing corporations, in effect, operates as an amendment of the act authorizing the formation of corporations; and that corporations hold their franchises in subordination to that provision.

The proceeding in question is either taxation, or something else; either an exercise of the sovereign right of taxation, or the exercise of some other power; either taxation, or not taxation. The provision, in express terms, purports, on its face, to provide for taxation. The convention that framed the article, and the people when they adopted it, evidently must have supposed they were providing a scheme of taxation. The provision admits of no other construction.

The provision is found in the chapter entitled "Revenue and Taxation," and the section says, "for the purpose of *assessment and taxation*," etc. If the proceeding is taxation, then it provides and can only provide for taking from the defendant an amount of money equal to its just share of the public burden to be discharged by the taxation, and nothing more. Anything beyond that, is taking private property for public use without compensation. If the proceeding is taxation, there is no necessity for resorting to any other provision of the constitution. If it is not taxation—if the amount demanded, or the principle adopted, is imposed as

a condition of continued existence, or as a limitation of its right to exercise its franchise, then it is an annual *bonus* demanded for the franchise, or the privilege of existence, such as was formerly often demanded and paid by corporations for the special privileges given by special charters, where there were no restrictions upon the legislative power upon the subject, and is not taxation. If it is a *bonus* demanded and paid for this right, then, *in addition*, the corporation is subject to taxation upon its property, for under the constitution all property must be taxed. "All property in the state," says the constitution, "not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." (Art. XIII, sec. 1.) And section 6 of the same article says, that "*the power of taxation shall never be surrendered or suspended by any grant, or contract, to which the state shall be a party.*" If, therefore, the provision of section 4, relative to "railroad or other *quasi* public corporations," is a *term or condition of the contract* upon which its existence and further exercise of its franchises depend, then it must still be liable to taxation on its property in the proper mode. By a contract authorizing certain persons to form a corporation and exercise its franchises, however valuable the consideration received, the state cannot, as we have seen, surrender or suspend its right to tax its property besides, as all other property is taxed. Other taxpayers are entitled to have the property of the corporations properly taxed. Again, if the submission to this mode of what is called taxation becomes a *valid* condition of the continuance or the further existence of the corporation and the further exercise of its franchises, then a refusal to pay the tax is a violation of the conditions of its being, and the courts, upon a proceeding for the purpose by the state, in the nature of a *quo warranto*, would probably adjudge the forfeiture of its charter, and wind up its affairs. This would be the appropriate remedy. I apprehend that no court would so adjudge under the present constitution on that ground. It is clear to me, therefore, from these considerations and the express terms themselves of the constitution, that the provision in question attempts to

provide only for exercising the sovereign power of taxation —has no other end to accomplish, and accomplishes no other purpose; and that the rights of the parties must be determined on that hypothesis alone.

Again, the general act authorizing the formation of corporations confers upon those complying with its provisions certain rights, franchises, and privileges. It endows the parties as organized with certain faculties and capacities, the result being to give them in their united character, under a certain name, a capacity to do business and acquire property. A law merely authorizing the formation of a corporation gives the corporation formed no property. That must be acquired by the corporation for itself. The legislature, under the various guaranties of the constitution, state and national, can only take away, limit, enlarge, or modify that which it gave. And what is given in the creative act is simply its capacities; its legal faculties, including all such as are essential to its corporate existence; all those powers which are strictly corporate, being those powers which can only be given by legislative act; powers not possessed by natural persons or partnerships, acting in their natural, individual, or associate characters, independent of legislation. These strict corporate powers I attempted to define in *Orton's Case*, 6 Saw. 187. The powers thus given, essential or otherwise, and their future exercise, may be modified or otherwise affected by subsequent legislation. A corporation having been formed with capacity to acquire and hold property, the legislature may, doubtless, grant to it, as well as to natural persons capable of taking, property rights; but such rights of property, when once vested, can no more be withdrawn than the property acquired from other sources, or than property granted to or acquired by natural persons. The property acquired in the exercise of its corporate faculties, from whatever source derived, is the property of the metaphysical being called the corporation, held, however, in trust for the sole benefit of the corporators. As such, it is protected like all other property, and can only be taken by the law of the land, in some one of the modes not inhibited by the constitution. It cannot, in my

judgment, be taken even as a further condition of corporate existence without the assent of the corporation or its corporators. There is no consent in this case to submit to any such conditions, and that is not the basis upon which the action is brought. There is no promise to pay a bonus set out in the complaint upon which an action can be maintained. I apprehend that a mere provision in the form of a statute or a state constitution adopted after the formation of a corporation, that corporations under the law should cease to exist unless they surrender to the state all the property theretofore acquired by the corporation, would be void. And power to demand a part, as a condition of existence, however small, is power to demand all. Such a statutory demand would be but a flimsy guise or pretext for evading all the guaranties of the constitution, which would not for a moment be tolerated. It would be to seek indirectly what could not be attained directly, the accomplishment of an unlawful end by what, at best, is but apparently lawful means. (See on this point *Parrott's Chinese Case*, 6 Saw. 349; opinion of Hoffman, J.) In that case I had occasion to say: "The end being unlawful and repugnant to the supreme law of the land, it is equally unlawful and equally in violation of the constitution and treaty stipulations to use any means, however proper, or within the power of the state for lawful purposes, for the attainment of that unlawful end, or accomplishment of that unlawful purpose. It cannot be otherwise than unlawful to use any means whatever to accomplish an unlawful purpose. This proposition would seem to be too plain to require argument or authority. Yet there is an abundance of authority on the point, although perhaps not stated in this particular form. (*Brown* v. *Maryland*, 12 Wheat. 419; *Ward* v. *Maryland*, 12 Wall. 431; *Woodruff* v. *Parham*, 8 Id. 130–140; *Hinson* v. *Lott*, Id. 152; *Welton* v. *Missouri*, 91 U. S. 279–282; *Cook* v. *Pennsylvania*, 97 Id. 573.)"

The observations of Mr. Justice Field, in *Cummings* v. *Missouri*, 4 Wall. 325, are pertinent in this connection. He said: "The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal

directness. The purpose of the law-maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same; for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." (See, also, *Henderson* v. *Mayor of N. Y.*, 92 U. S. 268; *Chy Lung* v. *Freeman*, Id. 279; *Railroad Co.* v. *Huson*, 95 Id. 472.)

The foregoing observations apply equally well to any effort to obtain the property of corporations by irregular means not applicable to natural persons. It seems to me that under our general system embodied in the constitution, providing for corporations, which forbids the granting of any special privileges not enjoyed by all other persons, it was intended to put corporations, with respect to their property and to all other matters, except what is in fact granted by the laws, in all particulars upon the same footing as natural persons.

In my judgment the state constitutional provisions under consideration, and the laws passed to carry them out, violate the provision of the fourteenth amendment, in question, in two vital particulars: 1. They assess railroad and other *quasi* public corporations upon a different basis from that adopted with respect to natural persons, similarly situated, in the particulars herein pointed out. 2. They provide, with respect to natural persons, notice and an opportunity to be heard in the course of the proceeding to assess their property before the assessment becomes fixed, while they afford no such notice, or opportunity to be heard, to railroad and other *quasi* public corporations; and in both these particulars deny to the latter the equal protection of the laws within the meaning of the fourteenth amendment to the national constitution.

Again, this suit is for a tax and nothing else. It proceeds

upon that idea, and the idea alone, that a valid tax has been assessed against the defendant, which this action is brought under the statute to recover. The suit cannot be maintained upon a liability imposed under other and different provisions of the constitution. If it cannot be maintained as for a tax, it must fail. The recovery, if any is had, must be upon the cause of action alleged.

We do not conceive that a provision for assessing railroads operated in more than one county, by the state board of equalization, while other local property is assessed by the local assessors, would be denying the equal protection of the laws, provided the assessment in the former case is, in all respects, made upon the same basis, under the same rules, and upon the same principles, as to value, notice, opportunity to be heard, etc., as in the latter. The presumption would be that all the officers would perform their duties justly under the law; and that the assessments so made upon property, differently circumstanced, would operate equally. Nor do we think that the assessment of the "franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in the state," "by the state board of equalization," as a unit, and apportioning the amount of the assessed value to the several counties, etc., in proportion to the number of miles in each, is objectional, on the ground that it denies the equal protection of the laws to the owner of the road.

Indeed, this seems to be the only practicable way of assessing such a road. It is owned and operated as a unit, and cannot be otherwise usefully employed. Its income, expenses, management, and all its operations are as a unit. Its rolling stock is at one point at one moment, and at another at a different point of time, but it is all working together as a unit to the accomplishment of one end. In fragments and isolated parts, the road would be comparatively valueless as property. It is only as a unit that it can be properly considered or properly taxed. To tax it otherwise would be to tax it upon principles materially different from those applicable to other property, necessarily considered and used as a unit. The character and circum-

stances of the property are such as seem to justify a classification for this purpose. These points, also, seem to be determined in favor of the plaintiff in the State Railroad Tax Cases, 92 U. S. 575. The other points, determined in this case, are not involved in those cases.

Whatever public inconvenience may temporarily result from our decision—and it must, necessarily, be great—satisfied, as we are, that the provisions of the state constitution now in question violate the inhibitions of the fourteenth amendment, our duty is plain; and we cannot, if we would, shrink from its performance. There must be judgment for the defendant.

Since the argument in these cases commenced, apparently in anticipation of what must necessarily be the result, various means, more or less violent, have been suggested, through the public press and elsewhere, to prevent railroad corporations from escaping the payment of their just share of the public burdens, such as taking away their franchises, seizing and appropriating their property first and litigating the right afterwards, and punishing by the severest penalties the officers of all such corporations, in all cases where resistance to payment of a tax is made in the courts, however illegal the exaction or whatever the ground of complaint on their part may be. Violent counsels of this character usually result in constitutional and statutory provisions such as those we are considering and now hold void, which render it necessary to seek the protection of our national Magna Charta. It would be idle—utterly futile—to insert a provision in the national constitution guaranteeing to every person within its jurisdiction his life, his liberty, and his property, if certain classes can be selected out in the subordinate legislation of the country to be visited with condign punishment, if they even seek to invoke the protection of this beneficent guaranty against discriminating and wrongful legislation. If a single individual can be deprived of the protection of this provision by such means, so can all. If such things can be, wherein does the protection of the guaranty consist?

A far wiser and more statesmanlike proceeding would

seem to be to avoid all occasion for resistance to wrong in the guise of void laws, by coolly and calmly re-examining the subject in the light of past experience, and so amending our state constitution and statutes as to bring them into entire harmony with all the guaranties of the fourteenth amendment, "the crowning glory of our national constitution"—that noblest and best constitution ever devised by the wisdom of man.

If the life, liberty, property, and happiness of all the people are to be preserved, then it is of the utmost importance to every man, woman, and child of this broad land, that every guaranty of our national constitution, whatever temporary inconvenience may be felt, be firmly and rigorously maintained at all times and under all circumstances. In the language of the supreme court of the United States, "The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism." (*Milligan's Case*, 4 Wall. 120.)

For the reasons stated, as well as those advanced by the circuit justice, I concur in the judgment ordered.

ORDER STAYING PROCEEDINGS.

As the questions we have considered are of the greatest importance, and their correct solution concerns not merely the railroad corporation which is the defendant, but corporations of every kind, other than municipal, we shall order a stay in all other cases (not decided to-day) now pending in this court, involving the same questions, until this case can be brought before the supreme court of the United States, and the questions involved shall have received by its judgment their final and authoritative determination.

If the decision now reached be there sustained, the state will be obliged to order a new assessment, in making which

the defendant will be allowed a deduction in the valuation of its property for the mortgage thereon, and also a hearing before the state board of equalization with respect to the assessment. If, on the other hand, the decision be reversed, the other cases can be at once disposed of. By taking out a writ of error immediately on the judgment now rendered, it is possible that the case may be advanced on the calendar and be heard at the coming term.

San Francisco and North Pacific Railroad Company *v.* Dinwiddie et al.

Circuit Court, District of California.
September 25, 1882.

1. Railroad Assessment Unconstitutional.—An assessment made in strict accordance with the provisions of the constitution of the state of California relating to the assessment of the property of "railroad and other *quasi* public corporations," violates the provisions of the fourteenth amendment to the constitution of the United States by taking private property without due process of law.
2. Voluntary Payment.—Such assessment is void. A payment under it is not a payment under duress, but is voluntary, and cannot be recovered.

Before Field, Circuit Justice, and Sawyer, Circuit Judge.

James A. Johnson, for plaintiff.

A. B. Ware, District Attorney for Sonoma county, for defendant.

By the Court, Sawyer, Circuit Judge. This is an action on the official bond, as tax collector of Sonoma county, of defendant Dinwiddie, against Dinwiddie as principal, and the other defendants as his sureties. The action is to recover something over eighteen thousand dollars, paid by plaintiff to defendant, Dinwiddie, under protest, for taxes assessed for the fiscal year 1881–82. The tax is alleged to have been assessed in pursuance of the provisions of section 10 of article XIII of the constitution of the state of Califor-

nia; and it is claimed that such assessment is absolutely void, because said provision, under which the assessment was made, violates the fourteenth amendment to the constitution of the United States, in not giving notice, or affording an opportunity to be heard, and, consequently, that the assessment, if it could be enforced, would take the property of the plaintiff without due process of law. The complaint alleges, as a breach of the condition of the bond, that defendant, Dinwiddie, advertised the said property assessed, being the franchise, roadway, road-bed, rails, and rolling-stock for sale for said taxes so assessed, and threatened to sell said property, when, to prevent a sale and save its property, and to prevent a cloud being cast upon its title, the plaintiff paid the amount of the tax under protest. The defendant demurs to the complaint.

In *San Mateo County* v. *S. P. R. Co.*, decided this morning, we have fully examined the question as to the validity of the provision of the state constitution under which this assessment for the tax in question was made, and have held that an assessment made in strict accordance with this provision is in violation of that provision of the fourteenth amendment to the constitution of the United States, which says: That no "state shall deprive any person of life, liberty, or property without due process of law," and is, therefore, void. As the assessment was utterly void, it would have afforded no justification for a forced collection of the tax. Being void, as plaintiff alleges that it is, it is insisted by the defendants that the payment was voluntary, and being so, the money paid cannot be recovered from defendants. This is, clearly, a voluntary payment within the rule laid down by the supreme court of California in *Bucknall* v. *Storey*, 46 Cal. 599. It cannot be distinguished from that case. There was no possession of the property in the tax collector to be released in this case. He had never seized, and he did not detain, and he did not even threaten to seize or detain, any property. He was simply proceeding to sell property out of his possession upon an assessment of a tax that was wholly void upon its face. Neither the sale, nor a conveyance under it, could create any cloud

on the title. The facts were fully known to the plaintiff, and the plaintiff maintained that the assessment and proceedings were absolutely void; and on this proposition the plaintiff turns out to be right. The assessment was claimed to be void, and it was on that very ground that the plaintiff objected to the sale, and paid the money under protest. The means of knowledge of plaintiff were equal to those of the tax collector. One or the other must suffer, if more money than the tax ought to have been, was actually paid. But the tax collector was a public officer, and was required by the terms of the law, at least, to collect this tax, which was assessed in form, in accordance with the provision of the state constitution, and it is so alleged. There is no more reason for his determining, at his peril, whether the constitutional provision under which he was required to act was valid, than there was for the plaintiff to pay, or decline to pay, at his peril.

The defendant, at least, acted in good faith upon what appeared in terms to be the constitution and laws of the state. The plaintiff was bound to know the law. If the plaintiff paid, when there was no actual seizure, or restraint of its goods, merely from a fear that it might be mistaken as to the law, it acted upon its own judgment as to what was the best course to pursue. It was merely a question of *policy*, and *not coercion*. If there was a mistake on its part, it was a mistake of law, which it was bound to know, and not a mistake of fact. It was, in fact, right in its view of the law. At all events the payment was, clearly, voluntary under the laws of California as settled in *Bucknall* v. *Storey*, *supra*, and we know of no subsequent decision of the supreme court of the state to the contrary. This being the law of the state, we are required to follow it. Had this been the only question, we should have had no jurisdiction, and the case would have been remanded to the state court, where this rule of law would have been enforced. The case was retained, only because it presented the question arising under the fourteenth amendment, and being obliged to retain the case for the determination of that question, it is necessary to dispose of all the questions necessarily arising in it. So, also, there

was no duress, as that term is defined in the civil code, section 1569. There was, certainly, no duress of the person, and there was no "detention of property" at all, it never having been seized, and, consequently, no "unlawful detention of the property of the plaintiff." All the other cases referred to have some difference in circumstance, such as actual seizure and detention, constituting duress as thus defined by the code, or some other circumstance distinguishing them, or else the facts are so defectively stated, as not to show upon what precise point the case turned.

The case of *Detroit* v. *Martin*, 34 Mich. 173, is, also, a strong case in support of the views we have adopted. In that case it was distinctly decided, that a threat to enforce payment of a void tax, no seizure of the goods, or the person having been made, or threatened, where the officer had no authority to compel payment otherwise than by the sale of the land, which could injure no one, would not constitute a payment made in consequence thereof anything but a voluntary payment; that a protest cannot, alone, change what would otherwise be a voluntary payment into an involuntary one; or change the rights of the parties. It was further held that one who had knowledge of the facts, being conclusively presumed to know that an assessment which is laid under a statute which is unconstitutional and void, cannot be made the basis of a sale that could constitute a cloud on his title, is presumed to know that he could not be injured by it.

It is alleged that the tax deed would, under the statute, be *prima facie* evidence, at least, of title, and that the case would come within the principle of *Pixley* v. *Huggins*, 15 Cal. 127. But in this counsel are mistaken. The tax deed under a sale upon the tax in question, if offered in evidence, would show upon its face that it was for a tax levied upon a railroad, its franchise, etc., under the provisions of the constitution of California claimed, and by us held, to be void. It would present a question of law arising upon a comparison of the deed with the law without other evidence. It would appear that a tax levied in pursuance of the constitutional provision could not be valid. The deed would be

rejected as void. No counter-evidence would be required to overthrow it. The tax deed cannot be evidence that there is a valid law under which the tax could be assessed. We take notice of the law. It would appear, at once, that a valid assessment could not under any circumstances be made under that provision of the constitution, and the statute in force. If made in accordance with those provisions it would be void. It would, therefore, not constitute any cloud upon the title. This is the doctrine of *Pixley* v. *Huggins*, cited. In *Williams* v. *Corcoran*, the supreme court of California, also, held, that "parties" are presumed to know the law; to know that the provision of the act in respect to the assessment of property within the district was void. "A tax deed," said the court, "based upon the assessment in this case would constitute no cloud on their title to the lands;" that a threat by the collector to sell without lawful authority was idle, and did not constitute coercion. (46 Id. 556.) To the same effect is *Wells* v. *Austin*, 53 Cal. 178. (See, also, *Burr* v. *Hunt*, 18 Cal. 308, and *Branch Turnpike Co.* v. *Yuba Co.*, 13 Cal. 190.) Mr. Cooley states the same rule with respect to clouds upon titles. (Cooley on Taxation, 542.) The same principle, as we have already seen, was adopted in *Detroit* v. *Martin*, before cited.

We are of opinion that no cause of action is shown by the complaint for the reasons stated and upon the authorities cited, and that the demurrer must be sustained, and it is so ordered.

Let final judgment be entered for defendants on the demurrer.

W. P. WATSON ET AL. *v.* S. L. BROOKS AND PHŒBE M. DEKUM.

CIRCUIT COURT, DISTRICT OF OREGON.
SEPTEMBER 27, 1882.

1. SALE OF REAL PROPERTY BY A BROKER.—A contract to sell real property for a commission is performed when the broker procures a person who is able to pay for the same, to enter into a valid contract to purchase upon

the terms proposed, or when he induces such person to offer to pay for the property and take a conveyance thereof upon being allowed a reasonable time to examine the title thereto, which offer is refused by the owner, on the ground that the time allowed the broker within which to effect the sale is about to expire.

2. TERRITORY, NOT A STATE.—The ruling in *New Orleans* v. *Winter* (1 Wheat. 91), that a territory is not "a state" within the meaning of that term as used in the constitution in making the grant of judicial power to the United States, and that, therefore, a resident of the former cannot sue in the national courts, as a citizen of a state, followed but questioned.

Before DEADY, District Judge.

William H. Effinger, for the plaintiff.

H. Y. Thompson, for the defendant Brooks.

Seneca Smith, for the defendant Dekum.

DEADY J. The plaintiffs, William P. and Matthew P. Watson, citizens of Washington territory, bring this action against the defendants, S. L. Brooks and Phœbe Dekum of Oregon, to recover the sum of two thousand five hundred dollars upon the following allegations of fact:

That during the year 1881 the defendants owned a certain property at the Dalles, Oregon, "known as the Dalles Water Co.," and engaged the plaintiffs, as their agents, to sell the same within a certain number of days thereafter for the sum of fifty thousand dollars, and authorized them to represent that they would "upon a sale being effected, make to the purchaser a good and sufficient conveyance" of the property "with covenants of general warranty," for which service the plaintiffs were to receive a commission of two thousand five hundred dollars, "or all in excess of forty-seven thousand five hundred dollars for which they should sell the property;" that on the last day of the time allowed the plaintiffs secured a purchaser for the property who was able to pay the sum of fifty thousand therefor, and offered to do so upon receiving a conveyance thereof, "provided the defendants would allow him by his solicitor to search the title to the same so that he might be advised as to whether they could convey a perfect title thereto, but that the defendants

refused to permit said search or to give time therefor, and thereby refused to complete the sale of said property;" and "capriciously and without justifying cause obstructed and prevented a consummation of said sale."

The defendants demur to the complaint, for that: 1. The court has not jurisdiction of the parties defendant nor the subject-matter; and 2. The facts stated do not constitute a cause of action. The case was argued upon both points of the demurrer, and the parties desire that both should be considered by the court.

Upon the second cause of demurrer the defendants claim that the plaintiffs agreed to make a sale of the property, which was not done by simply finding a person who was willing and able to purchase the same in case the title upon examination proved good. A sale of real property is an agreement by the vendor to convey the title thereto or an estate therein to the vendee for a certain valuable consideration then or thereafter to be paid. The conveyance is not a part of the sale but only a consequence of it; and the former is complete without the latter, even if it is not followed by it. The legal title remains in the vendor notwithstanding the sale until a conveyance is made to the vendee. (Bouvier, Sale, sub. 19.)

The plaintiffs undertook to make a sale of this property for a certain price within a certain time, and upon a representation authorized by the defendants to the effect that the title was good. To do this, it was necessary to find some one who was not only able and willing to purchase upon the terms proposed and within the time limited, but who should also agree to do so. And this agreement to be valid and binding should be in writing and signed by the purchaser. (Or. Civ. Code, sec. 775, sub. 6.)

In such case it matters not whether the transaction is consummated by the delivery of the deed and the payment of the purchase money or not, the person negotiating the sale has performed his undertaking and is entitled to his compensation therefor. The sale being effected by a valid agreement to a solvent purchaser, the broker has fulfilled his contract and is entitled to his commission; and if the

purchaser fails to comply with his agreement, the vendor has his remedy thereon.

And if the agreement to purchase is not reduced to writing and therefore not binding, but the parties proceed thereon and complete the transaction by the delivery of the conveyance and the payment of the purchase money, still the broker is entitled to his commission, because the sale made by him in fact is recognized and acted on by the parties, and the vendor has the benefit of his services in bringing the same about.

The case under consideration, however, is different from either of these. The contract of sale does not appear to have been reduced to writing, nor was it followed by a conveyance of the premises to the proposed purchaser. But no objection was made by the defendants to the contract on that account or to the solvency of the purchaser, but they refused to go on with the transaction solely upon the ground that the plaintiffs had not effected the sale within the time limited, because the purchaser required a reasonable time thereafter to examine the title to the property before paying for it and taking the conveyance.

It is also well understood, and was so assumed on the argument, though it is not so distinctly alleged, that owing to the situation of the parties and the property there was not sufficient time left for the examination of the title after the contract of sale was made, and that therefore the refusal of the defendants to accept the offer to purchase subject to such examination, was in fact a refusal to go on with the transaction upon the ground that the sale was not and could not be completed within the time agreed upon.

And this, it seems to me, is the turning-point in this case, so far, at least, as this question concerned—could the plaintiffs effect a sale of this property within the terms of their employment, subject to an examination of the title? I think they could, and that having done so, they complied with the obligation of their contract and were entitled to their commission. If the contract of sale was made without any stipulation as to the examination of title, the right of the purchaser to the examination would be implied, and

if upon such examination it should appear that there was a substantial defect in the title, he might decline to proceed, and still the plaintiffs would be entitled to their commission.

My conclusion upon this point is, that the plaintiffs effected a sale of this property—procured a purchaser for it—within the terms of their agreement, and that the defendants wrongfully refused to complete the transaction upon the erroneous assumption that such purchaser was not entitled to examine the state of the title before paying the purchase money and taking the conveyance, unless he could do so within the time limited for making the sale. This being so, it follows that the plaintiffs complied with their engagement, and that, so far as it appears, it was the fault of the defendants that the transaction was not completed in accordance with the sale.

In *McGavock* v. *Woodlief*, 20 How. 227, the supreme court in a case involving this question, says: "The broker must complete the sale; that is, he must find a purchaser in a situation, and ready and willing to complete the purchase on the terms agreed on before he is entitled to his commissions. Then he will be entitled to them though the vendor refuse to go on and perfect the sale."

The following cases have been examined in the consideration of this question, and though not exactly in point, they will be found to shed more or less light upon it: *Middleton* v. *Findla*, 25 Cal. 76; *Blood* v. *Shannon*, 29 Id. 393; *Phelan* v. *Gardner*, 43 Id. 306; *Knapp* v. *Wallace*, 41 N. Y. 477; *Fraser* v. *Wyckoff*, 63 Id. 445; *Cook* v. *Fiske*, 12 Gray, 491 Wharton on Agency, sec. 325.

But upon the other point the authorities are against the jurisdiction. The constitution (art. III, sec. 2) declares that the judicial power of the United States shall extend to controversies between citizens of different states and citizens of a state and aliens; and this jurisdiction has since been conferred on the circuit courts where the matter in dispute exceeds the sum or value of five hundred dollars. (1 Stat. 78; 18 Id. 470.)

At an early day it was held in *Hepburn* v. *Ellzey*, 2 Cr. 445,

that the District of Columbia is not "a state" within the meaning of that term as used in the article of the constitution defining the judicial power of the United States, and therefore a resident thereof could not sue in the United States courts as a citizen of a state. Afterwards, in *New Orleans* v. *Winter*, 1 Wheat. 91, the question arose in regard to a territory, and it was held that a territory was in the same category as Columbia; and though both are states—political societies—in the general sense of the term, neither is in the sense in which the term is used in the constitution, where it is intended only to comprehend "members of the American confederacy." In *Barney* v. *Baltimore City*, 6 Wall. 287, these rulings were followed without question upon the principle of *stare decisis*.

But it is very doubtful if this ruling would now be made if the question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown.

By it, and upon a narrow and technical construction of the word "state," unsupported by any argument worthy of the able and distinguished judge who announced the opinion of the court, the large and growing population of American citizens resident in the district of Columbia and the eight territories of the United States are deprived of the privilege accorded to all other American citizens, as well as aliens, of going into the national courts when obliged to assert or defend their legal rights away from home. Indeed, in the language of the court, in *Hepburn* v. *Ellzey*, *supra*, they may well say "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them." But so long as this ruling remains in force the judgment of this court must be governed by it.

The demurrer is sustained.

ASAHEL BUSH AND WILLIAM LADD *v.* THE UNITED STATES.

CIRCUIT COURT, DISTRICT OF OREGON.
OCTOBER 2, 1882.

1. BILL OF REVIEW.—A bill of review is a proceeding in the nature of a writ of error, and it may be brought to modify or reverse a decree given in a suit in equity in favor of the United States for errors apparent upon the face thereof.
2. IDEM—SERVICE OF SUBPŒNA IN.—Upon a bill of review to correct a decree given in favor of the United States the subpœna to appear and answer may be served on the district attorney.
3. QUI TAM ACTION UNDER SECTIONS 3490–3 OF THE REVISED STATUTES.—In an action brought by an informer upon sections 3490–3 of the revised statutes, to recover damages and forfeitures for collecting false claims from the treasury, the person who sues represents the United States therein, and also in all suits and proceedings brought or taken in aid of an execution or to enforce the judgment therein, and is entitled to control the same.
4. PRIORITY OF THE UNITED STATES.—The priority of the United States, under sections 3466–7 of the revised statutes, does not attach in the life-time of an insolvent debtor unless his property is taken by process of law, as in bankruptcy, insolvency, or attachment, or he makes a voluntary assignment thereof to a third person for the benefit of his creditors; and a judgment or judgments confessed by such debtor for an amount equal to the value of his assets with intent to hinder, delay, or defraud the United States is not such an assignment.

Before DEADY, District Judge.

George H. Williams, for plaintiff.

James F. Watson, for defendant.

DEADY, J. On August 1, 1882, the plaintiffs filed in this court a bill of review to procure, as to them, the modification of a final decree of this court, given in the case of *United States* v. *William C. Griswold and others*, including said plaintiffs, and signed and enrolled on August 12, 1881, for error apparent upon the face thereof.

The bill of review states that on January 29, 1880, the amended bill was filed by the United States in the original suit, and sets it forth in full. From this, among other things, it appears that on May 27, 1877, the United States,

by B. F. Dowell, informant, brought an action against W. C. Griswold under sections 3490 and 5438 of the revised statutes, to recover certain damages and forfeitures for knowingly collecting from the treasury of the United States, on January 11, 1879, false claims to the amount of seventeen thousand dollars, in which on July 30, 1879, the plaintiff obtained judgment for thirty-five thousand two hundred and twenty-eight dollars, and costs and disbursements amounting to two thousand eight hundred and twenty-one dollars and sixty cents; that said Griswold, at the date of said judgment, was the owner of certain real property situate in Salem, Oregon, including the west half of lots 1, 2, 3, and 4, of block 73, and lot 8 in block 10, which had been illegally sold and purchased by the plaintiffs herein, upon certain judgments held by them against said Griswold, contrary to the priority of the United States, and asked to have said proceedings set aside and the property sold, and the proceeds applied upon the aforesaid judgment of *United States* v. *Griswold.*

By the final decree it was provided, so far as the plaintiffs herein are concerned, that the property aforesaid should be sold by the master of this court, and the proceeds applied first, to the satisfaction of the plaintiff's liens thereon, and the remainder, if any, upon the judgment of the United States.

In the bill of review it is alleged that the United States had no right to priority of payment out of this property, and, therefore, the decree, so far as it provides for its sale and the disposition of the proceeds, is erroneous.

On August 2d, the subpœna issued upon the bill of review was served on Mr. James F. Watson, the United States district attorney, together with a copy of the bill and a notice from the plaintiffs, to the effect that the bill had been filed for the purpose, so far as they are concerned, of procuring a reversal of the decree of August 12, 1881, and requiring him "to appear and answer said bill, on the first Monday in September, 1882, or judgment thereon will be taken for the want of an answer."

On September 4th, the district attorney filed a motion to

dismiss the bill for the reasons following: 1. That the United States "cannot be sued herein without its consent," and that it has not nor does not consent "to be made a party herein;" 2. No process has or can be served on the United States by which it has been or can be "brought as a defendant into this court;" and 3. This court neither has nor can acquire "jurisdiction over the United States herein."

The motion to dismiss has been argued by counsel without any question being raised as to this mode of making the objection to the jurisdiction of the court.

It is well understood that the United States cannot be sued unless with its own consent, and that it has not given such consent except in a few instances, of which this is not one. (*U. S.* v. *Eckford*, 6 Wall. 487.) But an auxiliary or supplemental proceeding against the United States, growing out of an action instituted by it, is not generally considered a suit against the United States in that sense. Therefore a writ of error to reverse a judgment obtained by the United States may be sued out and prosecuted by the defendant therein.

The proceeding by this writ, though technically a new action brought to set aside the judgment in the old one, and it may be to recover what was lost by it, is nevertheless regarded from this standpoint, as one in which the United States is not thereby brought into court to answer the claim of the plaintiff in error without its consent, but rather one by which it is continued in court for the purpose of contesting the allegations of error in an action voluntarily instituted there by itself.

Now, a bill of review, particularly as in this case, where it is brought for error in law apparent upon the face of the decree, is in the nature of a writ of error. (Story's Eq. Pl., sec. 403, *et seq*). Indeed, the former has the same scope and purpose in a suit in equity that the latter has in an action at law, "to procure an examination and alteration or a reversal of a decree made upon a former bill" between the same parties. (Id., sec. 403.) No case has been cited by counsel in which this question has been directly considered.

United States v. *Atherton*, 102 U. S. 372, was a suit to set aside a decree of the district court of California confirming a claim under the act for the settlement of private land claims in that state.

But this decree was given upon a bill of review brought by the grantee of the claimant against the United States four years after the court had by a former and first decree rejected the claim. No question seems to have been made as to the jurisdiction of the district court to give a decree upon a bill of review against the United States; and Mr. Justice Miller, in the consideration of the case, said: "It is not denied by counsel, nor can it well be doubted, that the district court had jurisdiction by bill of review to set aside and correct the former decree."

In the case of *United States* v. *Lemore* (4 How. 226), and *Hill et al.* v. *United States* (9 Id. 386), it was held that the defendant in a judgment obtained by the United States could not maintain a suit to enjoin the latter from enforcing the same, upon the ground that the United States could not be sued without its consent.

But in the subsequent case of *Freeman* v. *Howe et al.* (24 How. 460), it was held that "a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit but auxilary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

This statement of the law seems to be in conflict with the ruling in the cases of *United States* v. *Lemore* and *Hill et al.* v. *United States*, *supra*, for if the court has jurisdiction of such auxiliary suit without reference to the citizenship or residence of the parties, it must be, because having acquired jurisdiction of the subject-matter and the parties in the original suit, it does not thereafter lose it because at some subsequent stage of the litigation before it, the exigency of its legal procedure requires the parties to change position as plaintiff and defendant. And with like reason,

if the court acquires jurisdiction in an action in which the United States is plaintiff, it must retain that jurisdiction so long as the litigation may properly be continued before it according to the usual course of procedure therein. True, the United States is a sovereign and cannot be sued in its own courts without its consent, but when it elects to go into court as a suitor it must submit to the usual course of procedure therein—at least so far as may be necessary to enable the defendant to maintain his rights.

A bill of review is an established mode of proceeding in a court of equity by which the defendant may have a decree given against him reviewed for errors upon its face by the court that pronounced it. It is only a more formal mode of rehearing the case, and is an incident of the original suit.

When called upon to answer such a bill the United States is not sued in any proper sense of the term, but only to show why a decree which it has obtained against the plaintiff, that is alleged to be erroneous and unjust, shall not be modified or reversed.

My conclusion is that the plaintiffs may maintain this bill to review the decree against them, and the next question is how shall the United States be served with the subpœna or notified of the proceeding. Being a body politic, service must be made upon some natural person for it. In the absence of any statute upon the subject, all considerations of fitness and convenience point to the district attorney as the proper person.

In Conkling's treatise, 687, it is stated that in the case of a writ of error against the United States the citation must be served upon "the district attorney, for the time being, of the district in which the judgment was rendered." In *United States* v. *Lemore* and *Hill et al.* v. *United States*, *supra*, the district attorney appeared and answered, but whether in obedience to a subpœna or notice does not appear.

In the English chancery, in the case of a bill to stay proceedings at law or a cross bill, if the plaintiff in the action at law or the original bill was "abroad"—beyond

seas—the practice was, upon motion of the plaintiff to order service of the subpœna to be made upon the attorney for his absent client. (1 Smith's Ch. 116, 605.) And *ex necessitate rei*, the same practice prevails in the national courts when the plaintiff in the action at law or the original bill is a non-resident of the state where the court is held and cannot be served personally therein. (Conk. Treat. 181; *Segee* v. *Thomas*, 3 Bl. C. C. 15; *Kamm* v. *Stark*, 1 Saw. 550, and cases there cited.)

But when the United States is the party to be served, it being known that it cannot be served personally, at any place, I think the process may be served on its attorney at once, without any previous direction from the court.

My conclusion is that the service of the subpœna, to appear and answer upon the attorney for the United States is proper and sufficient.

A question was made in the course of the argument as to who is the attorney of the United States in this case. The judgment in the action at law to recover the damages and forfeiture under sections 3490–3493 of the revised statutes is the foundation of this litigation. That action was brought by B. F. Dowell in the name of the United States as well for himself as it and at his own expense. The statute authorizing him to bring it gave him the sole control of it, except that he could not dismiss it without the consent of the judge and the district attorney.

In effect, this made him the representative of the United States, so far as that litigation is concerned. The subsequent suit in equity to subject certain property of the defendant in that action to the satisfaction of the judgment therein, was an incident of such action. It was brought in the name of the United States, apparently by the district attorney—at least the bill is signed by him, as such, and it is not alleged therein that B. F. Dowell sues for himself and the United States or in any wise. The bill is also signed by Dowell, as solicitor for the United States.

Both Dowell and the United States are interested in the judgment obtained in the action at law—one half the principal and all the costs belonging to the former. He also has

the right, I think, to institute and control all proper suits and proceedings in the name of the United States, to enforce such judgment for their joint benefit.

His signature to the bill, as solicitor, is an assertion that he is acting as attorney for the United States in the premises; but being there in company with, if not in subordination to that of the district attorney, may be construed to be an admission that he consents to the United States conducting or joining in the conduct of the suit by its ordinary attorney—the attorney for the district of Oregon.

Upon this theory of the case the United States has two attorneys in the suit, wherein the decree is sought to be review by this bill—the ordinary one and a special one. And it may be that both ought to be served with the subpœna. But as the district attorney must have come into the case with the consent of, if not at the solicitation of Dowell, I think he may be considered, for the time being, as the attorney for both Dowell and the United States.

The motion to dismiss is not allowed.

NOVEMBER 8, 1882.

DEADY, J. This case was before this court on October 2d, on a motion by the district attorney to dismiss the bill of review for want of jurisdiction. The motion having been denied the defendant demurred and the cause was argued and submitted on the bill and demurrer.

The first question for consideration is: Had the United States, upon the facts stated and found, a right of priority of payment out of the property of Griswold on January 6, 1879, by virtue of section 3466 of the revised statutes? which reads:

"Whenever any person indebted to the United States, is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate

and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

At this date, it appears that Griswold confessed judgments to sundry persons for an aggregate sum which, together with his indebtedness to the United States and sundry mortgage creditors, far exceeded the value of his assets, and that said judgments, with the exception of the one to the plaintiffs herein for three hundred and forty eight dollars and eighty-two cents, were based upon fictitious claims, and confessed with the intent to hinder, delay, and defraud the United States in the collection of a claim against Griswold, then in suit in this court, and upon which it obtained judgment against him on July 30, 1879, for thirty-five thousand two hundred and twenty-eight dollars, and two thousand eight hundred and twenty-one dollars and sixty cents costs and disbursements.

Upon this state of facts it was tacitly admitted by counsel and assumed by the court on the hearing of the original case, that the priority of the United States attached to the property of Griswold, subject to the liens of the valid mortgages thereon.

It is admitted that the statute giving the priority of payment was not applicable to this case, unless Griswold had made a voluntary assignment of his property; and it is also admitted that he had not done so, unless the confessing of these judgments amounted to such assignments.

There is no doubt that the effect of these judgments by means of the lien they carried, when docketed, unless set aside at the suit of creditors for fraud, was practically to transfer whatever interest Griswold had in the property in question to the plaintiffs therein.

But upon further reflection and examination I am satisfied that they did not amount to or operate as an assignment within the purview of the statute. The latter is only applicable to cases where the debtor's estate, either by his death, legal bankruptcy, or insolvency, has passed into the hands of an administrator or assignee for the benefit of his creditors, or where the debtor himself has voluntarily

made such disposition of it. It does not apply then to a conveyance, assignment, or transfer, by whatever means accomplished, to a real or pretended creditor or creditors, in payment or satisfaction of a debt or claim. There must be in some way, an assignment of the debtor's property to a third person, for distribution among his creditors, before the statute can be invoked, and then it operates directly upon the assignee by requiring him to pay the claim of the United States first, and making him personally liable therefor, if he does not. (Sec. 3467, R. S.)

The following authorities bear with more or less directness upon these conclusions: *United States* v. *Fisher*, 2 Cr. 390; *United States* v. *Hooe*, 3 Id. 90; *Conard* v. *The Atlantic Insurance Co.*, 1 Pet. 438; *Beaston* v. *The Farmers' Bank of Delaware*, 12 Pet. 132; 1 Kent's Com. 247; *United States* v. *The Canal Bank*, 3 Story 81; *United States* v. *McLellan*, 3 Sumn. 350; Conk. Treat. 723.

It follows that so much of the decree as provides that lot 8 in block 10, and the west half of lots 1, 2, 3, and 4 in block 73, in the town of Salem, shall be subject to the payment of the judgment of the United States, after they had been sold on legal process from the state court and before the entry of said judgment, upon the assumption that the priority of the United States had attached thereto, prior to such sale, to wit, on January 6, 1879, is erroneous, and must be reversed, and a decree entered dismissing the bill as to the plaintiffs in error.

SANTA CLARA MINING ASSOCIATION OF BALTIMORE *v.* QUICKSILVER MINING CO.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
OCTOBER 6, 1882.

1. MEXICAN GRANT, LEGAL AND EQUITABLE TITLE.—The holder of a Mexican grant containing a quicksilver mine conveyed the mine, together with one thousand acres of land surrounding the mine, to A., who went into possession, and he and his grantees continued in possession, working the mine for twenty-five years. After such conveyance the holder of the

grant executed a second conveyance to B., also embracing the mine and the land before conveyed to A. The grantees of B. presented the grant for confirmation, which was duly confirmed, and a patent in due form was issued to the confirmees. *Held:* That the legal title derived under the patent would be controlled for the benefit of the grantees of A., who held the better title under the first conveyance.

2. LOCATION OF LAND INDEFINITELY DESCRIBED.—Where a mine, together with one thousand acres of land, "around, circumjacent, and adjoining said mine," is conveyed by the owner of a larger tract, the land will be located as nearly as practicable in a square form around the mine, taking the mine as the center of the location, and the grantor, by subsequent conveyances of the larger tract in two parts to other parties, cannot affect this right of location by the prior grantee.

3. MINING PARTNERS—TENANTS IN COMMON.—Where a mine, together with the surrounding lands, is conveyed to, and the mine is worked by, an unincorporated association of individuals in the usual mode, as in the case of mining partnerships in California, the members of the association are tenants in common of the mine and the land so held.

4. SALE UNDER DECREE OF PROPERTY OF MINING PARTNERSHIP.—Where a bill is filed by a member of a mining partnership to wind up the affairs of the association, some of the members being omitted from the bill because of the impracticability of bringing them all before the court, and a decree is made dissolving the association, directing the mines and lands of the company to be sold, the debts to be paid, etc., and a sale of the mines and lands of the association is made in pursuance of the decree, the title to the undivided interests in the mine and lands of those not parties to the suit will not be affected by the decree and sale.

Before SAWYER, Circuit Judge.

Wm. Matthews, for complainant.

D. M. Delmas, for defendant.

SAWYER, Circuit Judge. This is a bill to control the title derived under a patent of the United States issued to the Guadalupe Mining Company. The Mexican grant of the land was made to one, Larios, in 1845. He afterwards conveyed to a man by the name of Cook. Cook subsequently conveyed to an association of persons, not a corporation, called the Guadalupe Mining Company, a mining partnership, or joint stock company. The Guadalupe Mining Company presented its claim for confirmation and obtained a patent. Cook, prior to the conveyance under which this patent was obtained, had conveyed a thousand

acres embracing the mine—a thousand acres surrounding this mine—by an indefinite description, "around, circumjacent, and adjoining said mine." That title has passed to the complainant in this case. That title passed through one, Grey, and wife, and complainant in this case has been in possession for twenty-five years under that title. The defendant, claiming under the patent, commenced sundry suits to recover the possession of the mine, and this bill is filed to control the title in favor of complainant, and restrain the prosecution of those suits at law. I am satisfied, upon an examination of the case, that the complainant is entitled to the relief sought, as to the one thousand acres of land.

There is a question as to the location. At the time when this conveyance of the thousand acres was made, the title to the entire grant was in Cook. Subsequently, he conveyed in two parts to different parties; one, the northerly part, he conveyed to the grantors of the parties who have acquired the patent—the Guadalupe Mining Company. The other part was conveyed to somebody else. It is contended, on the part of complainant, that this one thousand acres of land should be located on the portion patented to the Guadalupe Mining Company. On the other hand, it is contended, that placing the principal mine in the centre of the tract of land, it should be located, so far as practicable, so as to leave it in a square form, with the mine in the centre. This thousand acres having been sold when the grantor owned the whole of the land, his subsequently dividing the grant into parts could not transfer the location to the part subsequently conveyed to the Guadalupe Mining Company. Locating it in this form, it will not cover the whole of the land patented by the mining company. There is a diagram made from a survey by Ross Brown, which I think correctly locates the thousand acres. This location shows the thousand acres located in a compact form, as nearly square as practicable, which embraces portions of both parts of the grant, taking the mine as the centre of the location; and so far as that land is embraced in the patent to the Guadalupe Mining Company, I think the

complainant is entitled to the relief sought—a conveyance of the legal title, and an injunction against the prosecution of the suits at law. Under the decisions heretofore made in such cases as *Estrado* v. *Murphy*, *Samon* v. *Symons*, and that class of cases, complainant is, also, entitled to the relief sought as to those lands embraced within the Ross Brown survey, included in the patent, and within the lands described in the bill.

That leaves some other portions of the land described in the bill without the one thousand acres so located. It is insisted by respondent's counsel, that as to those lands, the bill must be dismissed, because if the complainant has a title at all, as is alleged in the bill, it is a legal title, and complainant has a legal remedy. I think that the complainant having been in possession for the last twenty-five years, and being in possession at the commencement of the suit, it alleges such a case against an adverse claimant as entitles the complainant to proceed under the statute to have the adverse claim determined, and its title quieted with reference to that portion of the tract. The facts alleged are sufficient to give jurisdiction on that ground. The thousand acres are also embraced in this title.

The title of the complainant to that portion depends upon the sale under judicial proceedings in the case of *Hallam Eldridge* v. *Sansevain and others*. That was a bill filed to close up the affairs of another mining organization to which many of the members were made defendants, but some were omitted, it being alleged, that the parties were numerous, and many of the real parties could not be ascertained, and they were, therefore, dispensed with, and the court proceeded to wind up the affairs of the mining copartnership, and placed the property in the hands of a receiver, who afterwards sold the lands out under a decree of the court, and they were conveyed to the purchaser. The title derived through that conveyance is vested in the complainant, and the allegation is, that they have been in the possession ever since.

My conclusion upon that branch of the case, is, that complainant is entitled to a decree establishing and quieting

the title to all of the undivided portions of the land, the title to which was in the defendants to that suit, who were served, or who appeared at the time or during the pendency of the suit, and to such others as make no resistance to the decree; but I think the Quicksilver Mining Company is entitled to a decree dismissing the bill as to those undivided parts held by it, derived from persons who were not parties to the suit, and were, therefore, not bound by that decree. That was a mining partnership, and the interests held in the land were in the nature of a tenancy in common, so far as the title is concerned, and I do not see how their title could be affected in their absence. It seems to me that this is the effect of the decree as laid down by equity rules 47 and 48 of the supreme court, which are founded upon a statute passed for such cases a few years before an adoption of the rule, and the rule established by decisions in such cases as *Shields* v. *Barrow*, 17 How. 139, and *Barney* v. *City of Baltimore*, 6 Wall. 280. In my judgment the title of the absent parties could not be affected without their presence as parties; but as to all except those parties, the complainant is entitled to a decree establishing and quieting its title derived under those proceedings as to the undivided interests in those parts lying both outside and inside of the patent, and within the lands described in the bill of complaint, and in the conveyances in that case.

A decree will be rendered accordingly, and counsel for complainant will prepare the decree in accordance with these suggestions and submit it to Mr. Delmas.

The complainant will recover costs.

STEAMSHIP ANCON, APPELLANT, *v.* CHRISTIAN THOMPSON ET AL., APPELLEES.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
OCTOBER 16, 1882.

1. COLLISION.—Where a steamer and schooner came into collision, the schooner having been seen approaching a mile and a half distant, the steamer was held to be in fault and liable.

2. FOG OR HAZE AND SMOKE.—The night being foggy, or hazy, or both, it was the duty of the steamer to moderate her speed, and blow her whistle.

3. INEXCUSABLE NEGLIGENCE.—If the schooner was seen from the steamer at a distance of a mile and a half, the negligence on the steamer in not keeping out of the way was inexcusable.

4. FOG.—In the condition of the atmosphere in this case, there was no fault in the schooner in not discovering the steamer at an earlier period of time.

5. NO FAULT IN SCHOONER.—Under the circumstances in this case, it was not a fault in the schooner, to put her helm hard-a-port at the time she did, nor was she in fault in other respects.

Before SAWYER, Circuit Judge.

FINDINGS OF FACTS.

1. On the morning of September 15, 1878, the side-wheel steamship, *Ancon*, on a voyage from Portland, Oregon, to San Francisco, California, came in collision with the schooner *Phil Sheridan*, whereby the latter was wholly lost. The collision occurred between twenty minutes and fifteen minutes before five o'clock in the morning of that day.

2. The collision occurred in the Pacific ocean, at a point therein to the northward and westward of the entrance to the Umpqua river, from six to seven miles distant from the shore at the mouth of said river.

3. The speed of the steamship at the time of the collision was, and for some hours before had been, by steam, about eight miles per hour; and, in addition, it had the advantage of a current in its favor of one mile or one and a half miles per hour. From four o'clock A. M. till the lookout of the steamer saw the schooner, and first ordered a change of the helm shortly before the collision, the course of the steamship had been due south.

4. On the fourteenth day of September, A. D. 1878, and up to six o'clock in the afternoon of that day, the schooner had been, and was, lying at anchor a short distance from land, the Umpqua river bearing north-east, about two miles distant. She was at that time bound from San Francisco to said river.

5. At six o'clock in the afternoon of the fourteenth day of September, A. D. 1878, the schooner got under way, and

with the wind north-north-west, stood off shore, close-hauled on the starboard tack, and continued on this course till twelve o'clock midnight.

6. At twelve o'clock, midnight, the schooner changed her course, went about on the port tack, and close-hauled, with the wind still north-north-west, occasionally varying from a point to a point and a half, stood in towards the land on a course north-east by north.

7. At twelve o'clock, midnight, and up to the time of the collision, the speed of the schooner was, and had been from two to three miles per hour—not exceeding three miles.

8. The schooner from twelve o'clock midnight, and up to the time of the collision, had all the lights required by law, properly set, and brightly burning.

9. The schooner from twelve o'clock midnight, and up to the time of the collision, had a lookout, properly stationed, and attentive to his duties, as such.

10. From four o'clock A. M. till the collision, the wind, with slight variations from time to time, was west-north-west, and the schooner, up to a point of time immediately before the collision, where the change in the helm hereinafter stated occurred, was sailing by the wind on a course north-east one-half north.

11. From and after ten minutes past four o'clock A. M. of September 15, 1878, up to the time of the collision, a fog prevailed in the track of the schooner of such density as to obstruct the view, and largely tend to prevent the steamship and its lights from being seen from the schooner, and a fog-horn was sounded on the schooner, at regular intervals of not more than five minutes.

12. At about twenty minutes before 5 A. M. the man at the wheel, on the schooner, heard the sound of the paddle-wheels of the approaching steamship, and thought it was the sound of the surf breaking on the shore. His orders had been to keep a good lookout for the shore. He thereupon gave his wheel one turn to port, and fixed it in that position by means of a diamond screw, the object being to enable him to go off quickly in case he should prove to be near shore, and then ran forward to where the man on the look-

out stood, to ascertain whether his supposition was correct. The sound at about the same time attracted the attention of the lookout, who also thought it was the breaking of the surf, and both were looking to see if breakers were near, when immediately, the loom of the approaching steamer appeared close upon them, on the port bow, not more than three ship's lengths distant, coming head on. This was the first known of the approaching steamer on board the schooner. The loom of the steamer first appeared, and, afterwards, the light at the mast-head was seen. The man on the lookout immediately commenced hallooing, to attract the attention of those on the steamer; and he heard the order on the steamer to put the helm hard-a-starboard; the helmsman at the same time seized the fog-horn, gave a blast upon it, and then hastened back towards the wheel, where he saw the captain, already at the wheel. The captain, being in his cabin, and hearing the hallooing and the fog-horn, rushed on deck, and seeing the steamer close on him, seized the helm and put it hard-a-port; and very soon thereafter the steamer struck the schooner on the port side just before the rigging.

13. It was the captain's watch on the schooner, from 4 o'clock A. M., and he was called at that hour. Upon looking out, and finding the sea not rough, he lighted his pipe and sat half dressed smoking in his cabin, near the steps, close by the wheel, till he heard the noise upon deck made by the lookout and helmsman, when he rushed out and put the helm hard-a-port, as stated in finding 12.

14. There was no officer on the deck of the schooner during the half hour preceding the collision, other than the man at the wheel, who was competent for the position, the cook, and the man on the lookout; but the latter was a competent lookout, and was at his proper post during all that time.

15. There was a torch on the deck of the schooner, but it was not lighted or shown, in the manner required by the act of congress; and there was no time to light or show the torch after the discovery on board the schooner of the approaching steamer, and before the collision. Had a lighted

torch been exhibited after a discovery of the steamer, it could not have prevented, or contributed to prevent, the collision. The schooner and its lights had been seen by, and its position was known to, the officer in charge of the steamer, as is shown by claimant's testimony, several minutes before the steamer had been discovered by those on and in charge of the schooner.

16. The general facts as stated in findings 12, 13, 14, and 15 are clearly and satisfactorily shown by the testimony of the libellants, to which there is no contradictory evidence, except as to the prevalence of fog, and certain inferential evidence upon the question as to whether the schooner changed her course at an earlier point of time, than that indicated in these findings, and upon the question of the fogginess of the weather. I think the greater weight of evidence goes to establish the existence of considerable fog. The testimony for the claimant, is, that the sky was overcast, and the atmosphere thick, smoky from fires in the mountains, and hazy without fog; and that a vessel could be seen two or three miles. I think from all the evidence that there was considerable fog along the path of the schooner, just prior to, and at the collision. The steamer itself encountered fog, and blew its whistle for some minutes soon after. It was either smoky and hazy, or foggy, or both; probably in some degree both. I am, also, satisfied that the finding states the facts as to the manœuvring of the helm of the schooner prior to and down to the collision.

17. The steamship, from four o'clock A. M., had all her proper lights set, lit, and burning, and at and previous to the collision, also, had her second officer, Douglas, a man of long experience at sea, on deck, and a competent man at the wheel.

18. The testimony of Douglas, the second officer of the ship, and the officer of the deck, at the time of the collision, given on behalf of the claimant, is to the following effect: At about half past 4 o'clock A. M., a short time before the collision, the special lookout of the steamer left the deck, with the permission of Douglas, the officer of the deck, to

get a cup of coffee, and thereupon, the officer of the deck acted as lookout for the steamer, and in so doing stood on the hurricane or upper deck of the steamer, and in the most forward part of said deck, and in a position where his view was unobstructed, and while said officer of the deck was thus on the lookout, he saw the schooner in question, some eight minutes before the collision, and at the distance of a mile and a half, the schooner being first seen; but very soon after showing her green light only, something more than a point off the starboard bow of the steamer. As soon as the schooner was seen by the officer of the deck on the steamer, he ordered the man at the wheel of the steamer to starboard his helm, which order was instantly obeyed by the man at the wheel, and thereby the course of the steamer was changed two points more to the port side, or shoreward. When the green light came into view the schooner was about a mile distant. Very soon after the green light appeared, both lights came into view, "so instantaneous" that it "confused" the officer—the schooner being then about three quarters of a mile distant. The two lights were in sight but an instant, not more than half a minute, when the green light disappeared.

Immediately after seeing the two lights, Douglas walked aft to a point about ten feet behind the pilot-house, notified the quartermaster at the wheel, that he must look out, as he had lost the lights, then walked forward and looked at the compass; then looked out for the schooner again, and saw her coming very near, and seeing the red light, only, ordered the helmsman to stop the ship; to blow the whistle in order to alarm the passengers, and to put his helm hard-a-starboard, all of which was immediately done. When he thus saw the red light, the schooner was off the steamer's starboard bow, and about two hundred and fifty yards distant; and he at once gave the order to stop her. The schooner was under the observation of Douglas with lights and no lights about eight minutes; and during this period after he saw the green light, there was a period of about three minutes, probably less, during which she was not under his observation at all. It was the period when he

went aft to give orders to the man at the wheel. The schooner, as stated by Douglas, when her green light was first discovered, was running on a line parallel with the course of the steamer, one point to the starboard of the steamer, and had the courses of the two vessels thus continued, they would have passed with a space of about a quarter of a mile between them, while the change of the steamer's course two points further to port by starboarding her helm, would have carried them all of a mile apart when they passed.

Another witness who was below at the starboard port, says he heard the order to starboard the helm given by the officer on deck, and looking out of the port saw a green light. He went on deck and there saw a red light. He judges it was four or five minutes after he thus saw the green light before the collision; the man at the wheel of the steamer, notwithstanding the order given him, did not see the schooner, or either of her lights, till she came close alongside, after the order to stop was given. This is the substance of the testimony given on the part of the claimant.

19. If I am wrong in the twelfth, thirteenth, fourteenth, and fifteenth findings, then the facts as testified to and stated in the eighteenth finding, present the case on those points in the strongest light for the claimant and appellant.

20. The steamer being heavily loaded and running at a speed of eight miles per hour, could not be stopped and backed within a less distance than one half a mile.

21. No order was given to stop and reverse the engine of said steamer, nor was the same stopped and reversed, nor was the speed of the steamer slackened at any time till about one minute, or less, before the collision, and when it was too late in that mode to avoid said collision.

22. From four o'clock on the morning of said fifteenth day of September, the steam whistle of the steamer was not sounded until after the lights of the schooner were discovered, nearly ahead of the steamer, at the time when the signal to stop was given, and not more than one minute before the collision—probably not so long—and when too late to avoid the same.

23. From half past four A. M. till the collision there was no lookout on the steamer other than the second officer, Douglas, who acted as lookout in the absence of the special lookout, while getting his coffee, as in these findings before stated.

24. In the condition of the atmosphere and the state of the fog, there was no fault on the part of those on the schooner in not discovering the steamer, at an earlier point of time than that at which it was discovered.

25. When the approach of the steamer was first discovered from the schooner, it was too late for those in charge of the latter to avoid the collision.

26. Immediately after the approach of the steamer was discovered from the schooner, the helm of the latter was put hard-a-port, but owing to her low rate of speed, this could have affected her course but little prior to the collision, and this was the first manœuvre on the schooner after a discovery of the steamer. This under the circumstances was not an improper manœuvre. At about the same time, the helm of the steamer was put hard-a-starboard; had it been put hard-a-port, the probability is that the vessels would have gone clear.

27. At the time when the approach of the steamer was discovered from the schooner, the course of the steamer was either south two points east, or due south, and that of the schooner north-east one half north.

28. At the time the helm of the steamer was ordered hard-a-starboard, the steam-whistle sounded, and the engineer was signalled to stop and back the steamer—all of which orders were promptly executed; it was too late to avert a collision by those movements, but it is probable that, had the helm been put hard-a-port instead of hard-a-starboard, the collision might have been avoided.

29. The fair value of the schooner was eleven thousand dollars.

30. The value of the money and other property lost by John Bott, the captain of said schooner, for which he is entitled to recover, is four hundred and forty dollars.

CONCLUSIONS OF LAW.

1. The steamer was in fault under the circumstances shown by the claimant's own testimony, taken in the most favorable light for claimant, in not blowing its whistle to attract the attention of the schooner, and warn it of the steamer's approach.

2. Those in charge of the steamer, at the time, were also in fault, even upon their own showing, in not stopping the steamer or checking its speed in time to avert the collision; and especially so, since the schooner was in plain view for a distance of a mile and a half, and for a period of from at least five to eight minutes, and since the officer in charge was still confused and uncertain as to the movements of the schooner in ample time to have stopped the steamer, or diminished its speed, until the manœuvres of the schooner could be definitely ascertained.

3. That the schooner was not in fault.

4. That the collision arose in consequence of the fault in the navigation of the steamer.

Let a decree be entered in favor of the libellants for eleven thousand dollars, the value of the schooner, and interest at six per cent. per anum from September 15, 1878; and in favor of the libellant, Bott, for the sum of four hundred and forty dollars, and interest thereon, from the same time, and at the same rate, and for costs.

Milton Andros, for libellant and appellee.

Hall McAllister, for claimant and appellant.

SAWYER, Circuit Judge. In this case I have examined with great care the voluminous testimony, and considered it in all its bearings.

After examining the record I find that I am compelled to concur with the district judge, and that the decree of the district court must be affirmed. For opinion of district judge, see 7 Saw. 118.

The facts as I have written them out in the findings, are as follows: [The findings are set out in the statement.]

I shall not attempt to go over, and discuss the large mass of testimony in the case, at any length. I shall only state some of the salient points. One point is, as to the manœuvres of the schooner. I see no reason to doubt from the testimony of those on board the schooner, as to its movements. The testimony seems to be fair and unprejudiced. There is no direct testimony to the contrary. So far as the testimony is given at all, it is concurred in by all those on the schooner—three or more witnesses—as to what took place at and immediately before the collision. The position of the schooner on the night previous, the object of running off and then running in for the purpose of making the river, would not call for any other changes in the movements of the schooner than those shown by the testimony of those on board to have taken place.

They were running, according to the testimony, upon a course that we should naturally expect them to be running, without any cause for changing the course, unless they had seen the steamer, and changed the course for that reason. The testimony of the three witnesses on the schooner, was that they did not see the steamer, until the time mentioned in the findings, that is, until she had got within about three ship's lengths of the steamer; although they were on the lookout, and there was a good lookout. The helmsman himself, as well as the regular lookout, was also on the lookout, because he had instructions to keep a sharp lookout for the shore, and they were on the lookout for the shore. I think there is no doubt about the rate of speed at which the schooner was going, which did not exceed three knots, and was probably considerably less.

That being so, they were running directly on their proper course, until the helmsman first heard the sound of the paddle-wheels of the steamer, which he supposed was the surf breaking upon the shore. He then immediately gave his wheel one turn to port, fixed it in that position with a diamond screw—the object being to be able to go about quickly, should it prove to be necessary—and ran forward in haste to see whether his suppositions were correct or not. About the same time the lookout himself also heard

the sound of the steamer's paddle-wheels. He was on the lookout to see what it was, and he also supposed it was the surf breaking on the shore. This place, as I understand it, is not the track in which the Oregon steamers generally go. They frequently go there, when there is particular occasion for it, such as winds or currents; and they seem on this occasion to have been in-shore further than usual, for the purpose of getting the advantage of the current. The steamer's approach was not noticed, although there was a lookout, and the helmsman himself was also on the lookout, until after the sound of the paddle-wheels was heard. The helmsman and lookout first discovered the loom of the steamer. Immediately on the discovery, the lookout began to halloo, to attract the attention of those on the steamer; and the other man blew the fog-horn, and then ran aft to his wheel again. The captain, hearing the noise on deck, being close by, and being partially dressed, sprang on deck, seized the wheel, and seeing the steamer coming directly head on, put her helm hard-a-port; and that is the first manœuvre on the schooner after the discovery of the steamer; and it was then too late to avoid the collision by any movement the schooner could make.

On the question of fog, the testimony of all the parties, both those on deck and those below, was, that soon after the four o'clock watch came on deck a fog came up. The helmsman said he thereupon passed the fog-horn forward to the lookout to blow, and he testified that the lookout did blow it at intervals, not exceeding five minutes, from that time until the collision. The lookout testifies to the same thing. The cook was on deck, and also testifies to the same facts. The captain, though below, also, testifies to hearing the fog-horn blown; so that unless these four witnesses all testify to what they must absolutely know to be false, there must have been a fog; otherwise, also, there would be no occasion for blowing the horn. They testify that there was a fog, and that the horn did blow at regular short intervals.

There were a good many witnesses on the steamer, being passengers, who testify that there was a fog, and the crew,

or quite a number of them, testified that there was a fog came on soon after the accident. Some witnesses, employees on the steamer, though not so many, testified that there was no fog at the time of the collision; but they also testify that the atmosphere was overcast, or dark, and was smoky or hazy, resulting from fires upon the land. Immediately after the collision, they began to rig a line on the steamer to enable the lookout, instead of the man at the wheel, to sound the fog-whistle. That indicates that there must have been some fog, or they certainly would not so soon have been rigging that line; and all the testimony is, that soon after they started, they being detained from twenty minutes to half an hour, and after they got under way, they ran into a fog-bank, then blew the whistle by means of this line which had been rigged, while they were picking up the passengers who had been on board the schooner.

I think the great weight of testimony is, that there was either a fog, or smoke, or haze, one or the other, or both, along the track of the schooner, which would be very likely to obscure the view of the steamer's lights. The testimony on board of the schooner is, that they first saw the loom of the steamer, before seeing the light, and very soon after that, they first saw the light at the masthead. The lookout of the steamer also testified, that he first saw the schooner from a mile and a half to two miles off, and before seeing her lights. I have taken a mile and a half as the distance. He says, he first saw the schooner, and soon after he saw the green light, when he got within about a mile, so that he saw the schooner first. Several credible witnesses—and among others was the captain, who is certainly a reliable witness, and an experienced man—said that in a fog of that kind, or smoke, he would be likely to see the loom of a vessel before seeing the lights. That may be so, but at all events I should suppose, that without a mist, or smoke, or fog, when it is simply dark, the lights of the vessel could be seen before an object which is also black, or dark. My conclusion, therefore, is, that there was considerable fog, mist, or smoke, probably both. The testimony indicates that there

were fog-banks from time to time. I find, therefore, from those general facts that the course of the schooner was as I have stated in the findings, and that there was a fog, or mist, or smoke, or both, sufficient to obscure the view of an approaching vessel, and excuse the schooner for not seeing the steamer in time. It is very manifest that after the steamer's approach was seen, and when the first manœuvre on the schooner was made, it was too late to avoid a collision by any action on board the schooner.

The statute requires the court to make findings of fact. In an admiralty or equity case, there is difficulty sometimes in stating specifically in brief terms the facts. It is somewhat difficult to specify satisfactorily the ultimate facts, or even to determine what they are, without argument; and I state them rather in the alternative, giving the claimant the benefit of the strongest statement of facts in his favor as made by Mr. Douglas, the mate, who was, in fact, the only one who testifies to anything on behalf of the steamer, as to the leading material facts, except so far as he is confirmed by the man who was looking out of the port. He testified to seeing the green light, and that he soon afterwards saw the red light from the deck. If Douglas saw the schooner a mile and a half or two miles off, as he says he did, the schooner being then a point off his starboard bow, he, having full control of the steamer's movements, certainly, ought to have been able to avoid a collision; and it was inexcusable negligence not to have done so. Considering the rate of speed at which they were going, and the distance and time, I do not see, if he is correct in his statement of facts, how it was possible for the schooner to get in the track of the steamer, so as to come into collision, even if it had made the attempt.

He, Douglas, says it was a mile and a half off, when he first saw the schooner, a point off his starboard bow. A mile distant is the nearest point that he locates the schooner, at the time he first saw the green light; and immediately upon seeing the green light he put his helm a-starboard, whereupon the steamer went off two points more to port, which would make three points. It seems to me, if that

was the position of these vessels, and the steamer continued in that course, whatsoever course the schooner could have possibly taken, she could not have brought herself into collision with the steamer even if she had tried to do so. The witness, Douglas, testifies that one point off would carry the vessels a quarter of a mile apart; and that two points more would carry them at least a mile apart. If the steamer then ran on that course, which he says she was, going at the rate of eight miles an hour by steam, accelerated one mile by the current, and the schooner's speed not exceeding three miles per hour, before the schooner could possibly intersect the line of the steamer's course at any point, it seems to me, that the steamer would have been a mile or two past, or at least a long distance past the point of intersection. Had the schooner turned and run directly at right angles, she would have had a mile to sail to intersect the steamer's path. While she was running that mile, the steamer would have run three, and been two miles past, as they were but a mile apart at the start. Had the schooner run in any other direction, she would have had more than a mile to run to intersect the steamer's track; and the steamer would have been still further off. Some allowance must doubtless be made for the time it would take the steamer to change her course after putting the helm a-starboard, but not enough to render a collision possible. There is some confusion in the testimony of Douglas. It is very remarkable, too, that the man at the wheel did not see the steamer, although it was not his business to act as lookout, because his attention was called to it twice; first, when he was directed to put his helm to starboard, the first time, when the vessel was at least a mile off, and then again when the two lights came into view, and the steamer was three fourths of a mile off. At that time the mate walked back—left his post and walked back abaft the wheel-house, and told the man at the wheel that he had lost the lights of that vessel, and to be careful and be upon the lookout. Even after that warning, when he would be very likely to look out, the man at the wheel did not see the schooner; and he never saw it until the last order was given to put his helm hard-

a-starboard, signal the engineer to stop the steamer, and blow his whistle to alarm the passengers; and then the steamer was coming directly down close on the port bow of the schooner. The officer in charge certainly should either have put his helm long before he did hard-a-starboard, or he should have ported his helm when he saw the schooner was changing its course, and, in either event, he had ample time to escape a collision. If he had ordered the helm a-port when he saw the green light and the red, or hard-a-starboard, or stopped or slowed down the steamer, as he might have done, he would have gone clear. If he had done either when she was three fourths of a mile off, as he could have done when he saw the green light disappear and the red light come into view, or both lights come into view, and then both lights disappear, the collision would not have occurred.

I am taking this testimony as Douglas gave it, and as corroborated by the man at the port below; and that is the most favorable position according to his own statement. If it was smoky, or hazy, or foggy, or both, then he was at fault in running at full speed, without blowing his whistle from time to time. The whistle was never blown, while the vessel was all the time going at full speed. While I do not propose to say that Douglas' testimony is wilfully false, yet the inclination in my mind is to think, that in his confusion, as he evidently was confused, and so states in his testimony, the probability is that he did not see the schooner so soon as he supposes, or until he was close upon her; that is the most favorable view that could be taken according to the probabilities; and that then it was too late, by that manœuvre at least, to avoid the collision. He saw the red light, and he should have ported his helm in the condition he was in, instead of putting it starboard. He could have done his best, at least, to check the speed of the steamer in time; and if he did not see it in consequence of fog, or smoke, which is highly probable, then he was in fault in running at full speed, and in not blowing his whistle from time to time to give notice to any approaching vessel. If he saw the schooner changing her course three

quarters of a mile off, as he says he did, he certainly should have blown his whistle, and done something at once, more vigorous and decisive, to avert the accident.

I can come to no other conclusion, than that the collision was the result of fault in the navigation of the steamer.

I have also examined the testimony to see if there is any reasonable ground for dividing the loss; but I find none.

I see no good reason for reaching a conclusion different from that attained by the district court, as to the value of the schooner. The libel alleges the loss sustained by the libellant, Bott, to be four hundred and forty dollars; and prays a decree for that amount. A larger amount is, therefore, not within the issues, or the prayer for relief. The decree will be limited to that amount.

HOLLISTER *v.* BELL. JAMES *v.* BELL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
OCTOBER 16, 1882.

1. REMOVAL OF CAUSES.—The second clause of section 639 of the revised statutes was repealed by the act of congress of March 3, 1875.

Before SAWYER, Circuit Judge.

SAWYER, Circuit Judge. This action was brought in the state court of Santa Barbara county, and removed by R. S. Den as to himself, under the second clause of section 639 of the revised statutes, on the ground of citizenship, and that there was a controversy which could be wholly determined as to him, without the presence of other parties.

At the last term of the supreme court of the United States, it was held in *Hyde* v. *Ruble*, that "the second clause of section 639 of the revised statutes was repealed by the act of 1875." (*Hyde* v. *Ruble*, 104 U. S. 407.)

The law under which the removal was had, having been repealed long before the removal, it was not removable. The case must, therefore, be remanded to the state court for want of jurisdiction, and it is so ordered.

IN RE GEORGE MONCAN, ALIAS AH WAH, AND AH KEE.

DISTRICT COURT, DISTRICT OF OREGON.
OCTOBER 27, 1882.

1. TOUCHING AT A PORT OF THE UNITED STATES.—A vessel touches at a port of the United States within the meaning of section 3 of the act of May 6, 1882 (Ses. L. 1881-2, p. 59), to exclude Chinese laborers from the United States, when she calls there for orders or a cargo for a foreign port, and Chinese laborers who are on board of her as passengers or crew are not unlawfully in the country contrary to said act, during her stay for such purpose.
2. CHINESE CREWS.—The act aforesaid does not apply to Chinese who enter a port of the United States as seamen or members of the crew of a vessel arriving from a foreign port, with the intention of returning or proceeding to another foreign port in the ordinary course of commerce and navigation; but if such Chinese leave the vessel while in the American port and do not depart with her, their presence in the country becomes unlawful.
3. THE DECK OF AN AMERICAN VESSEL IS AMERICAN TERRITORY.—A person on board of a vessel of the United States or any one of them, is in contemplation of law within the territory and jurisdiction of the United States, and therefore a Chinese laborer who shipped on an American vessel at London prior to the passage of the act aforesaid, and continued on her until her arrival in the United States, although after the expiration of the ninety days next following the passage of said act, is entitled to reside therein.

Before DEADY, District Judge.

James F. Watson, for the United States.

M. W. Fechheimer, for defendants.

DEADY, J. On October 25, 1882, Ah Kee and George Moncon, alias Ah Wah, were brought before me on warrants issued by me under section 12 of the act of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," Ses. L. 1881–2, p. 61, upon the charge of being unlawfully within the United States contrary to section 1 of said act.

Upon the hearing, the following facts were established and admitted: On February 18, 1882, Moncan joined the American ship *Patrician* at London, as cook, and on March

9th signed the articles for a voyage thereon in that capacity, to Cardiff, and from thence on a general trading and freighting voyage, as the master might direct, not exceeding twenty-four months in duration, and back to a port of discharge in Europe or the United States; that the vessel went to Yokohama, Japan, where on September 11th, in consequence of the steward, Ah Sing, being discharged, Moncan was made steward and Ah Kee shipped as cook for a voyage to Astoria, Oregon, or for orders, and thence to such ports as the master might direct, not exceeding twenty-four months in duration; that on October 14th the *Patrician* entered the Columbia river, and arrived at this port on October 24th with Moncan and Ah Kee on board as steward and cook, respectively, where they remained until removed upon the warrants issued for their arrest.

Both Moncan and Ah Kee are natives of China, and were duly shipped before the American consuls of London and Yokohama, respectively. The *Patrician* belongs at Damariscotta, Maine, and is now loading with wheat for Europe, and will be ready to sail in a few days; and the master, unless prevented, expects to carry these men with him for the voyage specified in the articles.

Section 1 of the act of May 6, 1882, declares that upon the expiration of ninety days from its passage and for the period of ten years thereafter, "the coming of Chinese *laborers* to the United States" is suspended; and that "during such suspension it shall not be lawful for any Chinese *laborer* to come, or having so come after the expiration of said ninety days, to remain within the United States."

By section 2, it is made a misdemeanor, punishable by a fine and imprisonment, for the master of any vessel "to knowingly bring within the United States on such vessel, and land, or permit to be landed, any Chinese *laborer* from any foreign port or place."

From the operation of these two sections the third one excepts Chinese laborers who were in the United States on November 17, 1880, or who might come therein within the ninety days next after the passage of the act; and also the case of any master bound to a foreign port whose vessel

shall come within the United States "by reason of being in distress or in stress of weather, or *touching* at any port of the United States on its voyage to any foreign port or place; *provided*, that all Chinese laborers brought on such vessel shall depart with the vessel on leaving port."

Section 12 provides "that any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the president of the United States and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to remain in the United States."

This act was passed in pursuance of the treaty with China of November, 1880 (Ses. L. 1881-2, Treaties, etc., p. 12), supplementary to that of July 28, 1868. (U. S. Pub. Treat. 148.) By the former the right conceded to the Chinese by the latter, to come to and reside within the United States at pleasure, was modified so as to authorize the government of the United States, whenever, in its opinion, "the coming of Chinese *laborers* to the United States or their residence therein affects or threatens to affect the interests of that country," to regulate, limit, or suspend the same; but such "limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations."

It is not to be presumed that congress in the passage of this act intended to trench upon the treaty of 1868 as modified by that of 1880. And therefore it is, that all general or ambiguous clauses or phrases contained in the former should be construed and applied so as to make them conform to the latter.

It is manifest that the concession in the supplementary treaty of 1880 was only asked and obtained by the United States for the purpose of allowing it to limit or suspend the existing right of Chinese laborers to come and be within its territory, for the purpose of laboring therein and thereby competing with the labor of its citizens for the local means of livelihood.

Counsel for the Chinese contends: 1. That under the circumstances, the *Patrician* is a vessel "touching" at a port of the United States "on its voyage" to a foreign one, and therefore within the exception contained in section 3 of the act; and 2. That the crew of a vessel arriving at a port of the United States from a foreign port or place, in the ordinary course of commerce and navigation, are not "laborers" within the meaning of the act.

When the *Patrician* entered the Columbia river, the terminus *ad quem* or place of termination of her voyage was not definitely known. It might be either in Europe or the United States; and so far as now known, it is in the former. But, even so long as it might be in either country, I think she ought to be, for the purpose of this act, considered as on a voyage to a foreign port. But it is certain that her port of final destination was not Astoria, at which place she merely called for orders. Nor had the voyage then terminated as to the steward and cook, whose engagements were for twenty-four months each from the date of signing the articles, unless sooner discharged. (Sec. 4511, R. S.)

A "voyage" is not limited to the passage of a vessel from one port to another, but it may include several ports. (Bouvier, Voyage; 1 Pars. S. & A. 307.)

The word "touch" and its derivatives, is, in a sense, a nautical phrase. It is defined thus: "To come or attain to; to arrive at; to reach; as— 'To *touch* their natal shore.' —*Pope;*" and its use is illustrated as follows: "*To touch at*, to arrive at or come to without stay, as in sailing. 'The next day we *touched* at Sidon.'—*Acts* xxxvii, 3." (Wor. Dic., Touch.)

The word "touching" is evidently used in the act to signify the opposite of "staying." And it does not apply to the case of a compulsory entrance on account of distress or stress of weather, for that is otherwise specifically provided for. A vessel does not ordinarily touch at her home port, but remains there until a new voyage is undertaken. But in course of a trading voyage from England to Asia and back to Europe or the United States, she may touch at many ports and for many purposes. Calling at a port for

orders, is in my judgment a plain case of "touching" at such port; and if in pursuance of the order obtained or being there, the vessel remains long enough to take in a cargo for a foreign port, I see no reason, under the circumstances, for concluding that she is thenceforth "staying" but not "touching" at such port.

Upon this view of the case the *Patrician* has simply touched at this port. Her stay here is only temporary, and for an object necessary to enable her to prosecute a voyage to a foreign port with profit to her owners.

Nor do I think that the Chinese members of the crew of the *Patrician* are "laborers" within the meaning of this act. True their vocation is labor. But they are not brought here to remain and enter into competition with the labor of the inhabitants of the country. They labor upon the high seas in the navigation of a vessel engaged in the exchange of commodities between this country and other parts of the world.

This commerce it is the direct interest of both the labor and the capital of the country to foster and promote. In a note to the opinion of Mr. Justice Field, in the *Matter of Low Yam Chow* (7 Saw. 546), it is stated upon the authority of the Chinese consul, that the value of the commodities exchanged between China and the United States in the year of the Burlingame treaty (1868) was fifteen million three hundred and sixty-five thousand and thirteen dollars; while for the year ending June 30, 1881, they had reached twenty-seven million seven hundred and sixty-five thousand four hundred and nine dollars—being a gain of almost one hundred per centum in thirteen years. When this treaty was concluded the export of flour at the port of San Francisco was about twenty thousand barrels a year, while in 1881 it had reached two hundred and seventy-one thousand one hundred and eighteen barrels—ninety per centum of which was shipped by Chinese merchants.

It is not to be supposed for a moment that congress intended by the passage of this act to impede or cripple this commerce by prohibiting in effect all vessels engaged in the carrying trade to and from the United States, and particu-

larly those on the Pacific coast, from employing Chinese cooks, stewards, or crews when for any reason it is necessary or convenient to do so. For such would necessarily be the result of holding that the Chinese crew of a vessel coming from a foreign port to one of the United States are "laborers" with the meaning of the act. Such a "limitation" upon the right of the Chinese to enter or be brought within our ports is clearly beyond the letter and spirit of the concession made by the supplemental treaty, which declares that it shall only apply "to Chinese who may go to the United States *as laborers*"—that is, with the intention to labor here and enter into competition with the labor of the country. Upon this ground also it is clear to my mind that the act does not apply to the crew of the *Patrician*.

Of course a Chinese seaman, although allowed to come into the ports of the United States as one of the crew of a vessel from a foreign port, does not thereby obtain the right to remain in the country and become a laborer therein; and if the master allows him to go ashore permanently, the latter would be liable to removal and the former to the punishment prescribed in section 2 of the act. But such seaman would have the same right to be on shore temporarily and not otherwise employed than in the business of the vessel, during her stay in port, as those of other nationalities.

Counsel for Moncan also claims that the act does not apply to him at all, and that he is entitled now to remain in the United States, as a laborer, because he was lawfully on board of an American vessel as a member of the crew thereof after November 17, 1880, and before the passage of the act, where he has ever since remained.

The rule is well established that the vessels of a nation are to be considered as a part of its territory and the persons on board of them are deemed to be within the jurisdiction and are protected and governed by the laws of the country to which such vessel belongs. (Vattel, b. 1, c. 19, sec. 216; Wheat. Inter. Law, 157; 1 Kent, 28; *Crapo* v. *Kelly*, 16 Wall. 611. In the *Matter of Ah Sing*, *ante*, Mr. Justice Field says: "An American vessel is deemed to be a part of the territory of the state wherein which its home

port is situated, and as such a part of the territory of the United States. The rights of its crew are measured by the laws of the state or nation and their contracts are enforced by its tribunals."

For many purposes, in contemplation of law, Moncan has been within the territory and jurisdiction of the United States, ever since he sailed from England on the *Patrician*, and I think this ought to be considered one of them. He joined the crew of an American vessel bound for a port in the United States, before the passage of the act, and while in that condition is brought within the actual territorial limits of the country. To drive him back now from our shores as a person prohibited by this act from residing within the United States, would, it seems to me, be giving it a narrow and harsh construction, utterly at a variance with the spirit and intent of our treaty stipulations.

This act may be enforced, so as, for all practical purposes, to exclude Chinese laborers from coming here and entering into competition with the labor of the inhabitants of the country, without spitefully straining it to cover a few doubtful or extreme cases, and thereby eventually bringing it into deserved odium and disrepute. Nor should it be forgotten by those who favor the exclusion of Chinese laborers from the country and wish to see the experiment fairly tried, that the act is unfavorably regarded by a large portion of the most intelligent and influential people of the country "as being the servile echo of the clamors of the sandlot; as fraught with danger to our commercial relations with China; as inconsistent with our national policy; as obstructing the spread of Christianity, and as violative, not only of the treaty, but of the inherent rights of man." (HOFFMAN, J., *In re Low Yam Chow*, 7 Saw. 560.)

My conclusion is that neither Moncan nor Ah Kee is unlawfully in the country within the purview of the act of May 6, 1882, because: (1.) They are simply on board of a vessel "touching" at this port while on a voyage to a foreign one; (2.) They are here only as members of the crew of a vessel arriving from a foreign port and taking on cargo for another; and further, that Moncan having joined

an American ship prior to the passage of the act, and remained on her until his arrival here, is not thereby prohibited from residing in the country.

The prisoners are discharged from the arrest, and the marshal is directed to return them to the vessel from which they were taken.

THOMAS COLLINSON *v.* EUGENE JACKSON, MARY JACKSON, AND TILDEN BEAUCHAMP.

CIRCUIT COURT, DISTRICT OF OREGON.
NOVEMBER 1, 1882.

1. AMENDMENT.—An amendment allowed to the bill on the final hearing, stating the value of the matter in dispute to be over five hundred dollars.
2. FRAUDULENT CONVEYANCE.—A voluntary conveyance of real property by a husband to his wife through the intervention of her father, which left him unable to pay his debts, or if made for a valuable consideration, as claimed, it being also made within the intent to hinder and delay creditors to the knowledge of the wife, held fraudulent.
3. PROMISE OF WIFE TO HUSBAND.—At commen law a husband and wife cannot contract with one another, and therefore the *promise* of the wife to release her right of dower in certain property of the husband's is not a valuable consideration for a conveyance by him to her of other property.
4. BILL BY JUDGMENT CREDITOR TO SET ASIDE CONVEYANCE.—The assignee of a promissory note brought an action against the maker, in this court, and had judgment therein, and then brought a suit to set aside a certain conveyance of the judgment debtor to his wife, as fraudulent: *Held*, that the wife was entitled to show as a defense to the suit that the judgment was void for want of jurisdiction in the court to pronounce it.
5. ACTION IN THE NATIONAL COURTS BY THE ASSIGNEE OF A PROMISSORY NOTE.—The assignee of a promissory note may now sue in the national courts without reference to the citizenship of his assignor (18 Stat. 470); and if the assignment is absolutely and legally made, the motive which induced it in no way affects the right of the assignee to sue in said courts.
6. CONVEYANCE TO HINDER, ETC., CREDITORS, GOOD BETWEEN THE PARTIES.—A conveyance though made to hinder, delay, or defraud creditors, is valid as between the parties thereto, and is only so far voidable as to enable a creditor who is prejudiced by it, to enforce his demand against the grantor.

Before DEADY, District Judge.

M. W. Fechheimer and Henry Ach, for plaintiff.

T. B. Handley, for defendants Beauchamp and Mary Jackson.

DEADY, J. This suit is brought by Thomas Collinson, a citizen of California, against Eugene S. Jackson and Mary Jackson, his wife, and Tilden Beauchamp, her father, all citizens of Oregon, to set aside two certain conveyances of over one hundred and sixty acres of real property, situate in Washington county, Oregon, as being made to hinder, delay, and defraud the creditors of said Eugene Jackson. The case was heard upon the bill, the answer of the defendants, Mary Jackson and Beauchamp, and the replication thereto and the testimony. As against the defendant Eugene S. Jackson, the bill was taken for confessed for want of an answer by him thereto.

On the hearing, objection was made by counsel for the defendants that the value of the land—the matter in dispute—was not alleged in the bill, and therefore it did not appear that the court had jurisdiction of the suit. Thereupon the plaintiff moved for leave to amend his bill, so as to allege that the premises are of the value of three thousand dollars. The hearing of the cause was then concluded, but it stood over for determination until the motion to amend should be disposed of. Afterwards, upon consideration thereof, the motion to amend was allowed. (1 Dan. Eq. 417; Story's Eq. Pl., sec. 904, 905; *Neale* v. *Neales*, 9 Wall. 1.)

The defendants, Beauchamp and Mary Jackson, after due notice of the allowance and filing of the amendment, having failed to answer the same, as required by the order of the court, it was duly taken for confessed against them.

Quite a number of witnesses, including the defendants, were examined before the examiner. The examination appears to have taken a wide range; and much of the testimony is irrelevant and immaterial, and that, which is otherwise, is often conflicting and contradictory.

But the material facts of the case are easily found, and they are substantially these: On January 1, 1878, and for some months before, the defendant, Eugene S. Jackson, was indebted to the firm of Hotaling & Co., liquor dealers in

Portland, in the sum of two thousand four hundred and forty-three dollars and eighty-six cents, for "goods" before that time sold and delivered to him, while engaged in the saloon business at Amity and Independence; and being so indebted he gave his note therefor, payable to the order of said firm one day after date, with interest at one per centum per month. Afterwards, between January 28 and July 18, 1878, Jackson made three payments on this note, amounting to one thousand three hundred and twenty-two dollars and eighteen cents—the last one, of nominally one thousand dollars, consisting of the conveyance of his saloon at Independence, on which Hotaling & Co. had a mortgage, and for which they have not yet been able to realize five hundred dollars.

On April 28, 1880, H. & Co. assigned this note to the plaintiff, who brought an action thereon, against the defendant, Eugene S. Jackson, in this court, and on May 26th thereafter, obtained judgment therein, for want of an answer, for the sum of one thousand six hundred and twenty-six dollars and five cents and sixty dollars and fifty cents costs.

On December 29, 1877, Jackson conveyed the premises in controversy to his wife's father, the defendant Beauchamp, for the nominal consideration of one thousand dollars, and in trust that he would convey the same to the defendant Mary Jackson, which he did on the same day for the nominal consideration of five dollars.

At the date of these conveyances, Jackson was in failing circumstances, and his assets, apart from this property, were not sufficient to pay the debt of Hotaling & Co. They consisted of an interest in his father's estate, being the undivided one seventh of certain real property in Washington county, which he sold on November 21, 1878, to his brother, William R. Jackson, for one thousand dollars; the saloon property at Independence, worth not to exceed five hundred dollars; the stock in the saloon at Amity, worth it may be four hundred dollars; and from one thousand dollars to one thousand five hundred dollars of saloon accounts, worth next to nothing, and certainly not more than twenty-five cents on the dollar, three hundred and fifteen dollars—mak-

ing in all at the very highest estimate two thousand two hundred and fifteen dollars; out of which it is not probable that more than one thousand two hundred dollars could have been made on execution.

By the law of this state (Or. L., p. 523, secs. 51, 55), it is provided as in chapter 5 of 13 Elizabeth, that every conveyance of any estate in lands "made with the intent to hinder, delay, or defraud creditors of their * * * demands * * *, as against the person so hindered, delayed, or defrauded shall be void," except in the case of a purchaser for a valuable consideration without notice of the fraud or fraudulent intent.

Upon the facts stated the reasonable inference is that the conveyance to the wife through the father-in-law was made with the intent to hinder, delay, and defraud the creditors of Jackson, and neither the wife nor father-in-law being purchasers for a valuable consideration it is declared void by the statute as against such creditors. (Bump on Fraud. Con. 267.)

But in addition to this, there can be no doubt from the evidence that Jackson actually intended, by this conveyance to his wife, to put the property beyond the reach of his creditors, and so he and his attorney now admit and testify; and that she was fully aware of his purpose and actively participated in it. True, she denies this now, but without reason or probability. Besides, the transaction is covered with the usual badges of fraud.

The conveyance to Beauchamp, made upon a mere nominal consideration furnished by the grantor, falsely recites that the consideration was one thousand dollars; and the consideration of five dollars, upon which the conveyance to the wife purports to have been made, was also furnished her for the occasion by her husband. The pains taken to disguise the true nature of the transaction is only explainable on the theory that all parties to it were aware that a fraud was intended.

The two conveyances, although made at the same time and place—Beauchamp's house—were designedly witnessed by different persons, and acknowledged before different offi-

cers, and filed for record on different days, so as to create the impression that they were independent and unrelated acts, and not the component parts of a preconcerted scheme to put the husband's property into his wife's name with the intent to prevent his creditors from reaching the same, as was the fact.

In addition to these, there is the suspicious circumstance, that the conveyances were made to near relations—the father-in-law and wife of the grantor. (Bump on Fraud. Con. 54.)

After this property was thus conveyed to the wife—in February, 1880—she left her husband and has since obtained a divorce from him; and this circumstance seems to have prompted him to disclose the true nature of the transaction to his creditors, in the hope, as he testifies, that if he cannot have the benefit of the property himself by holding it in the name of a wife, it may go to the payment of his debts.

The defendant, Mary Jackson, joined in the conveyance by her husband of his interest in his father's estate, and that of the saloon property at Independence, and thereby relinquished her right of dower therein; and she testifies that when the premises in question were conveyed to her, it was done in pursuance of a verbal agreement then made between herself and husband, by which she promised when thereafter requested, to join him in the conveyances of the other property above mentioned. And it is now claimed that this *promise* to relinquish her dower was a sufficient consideration to support the conveyance to her.

The first answer to this proposition is, that the evidence does not support it; and the second is, that the promise, if proven, is void, because made by a wife to her husband (*Pittman* v. *Pittman*, 4 Or. 299; *Elfelt* v. *Hinch*, 5 Id. 257), and because it was not in writing. (Code of C. P., sec. 775, sub. 6.) And being a void promise, it could not be enforced, and therefore it was not a valuable consideration moving from the grantee at the time of the conveyance, although it was subsequently performed. (Bump on Fraud. Con. 220, 222, 225.) In *Howe* v. *Wildes*, 34 Me. 570, it was held that the note of a *feme covert* was not a valuable considera-

tion although paid when due, and that therefore a conveyance by a son to his mother upon the consideration of her note was voluntary and void as against his creditors.

But the conclusive answer to this claim is, that let the consideration for the conveyance to the wife be ever so valuable, she took it with full knowledge of her husband's intent to thereby hinder and delay if not defraud his creditors, and was therefore a party thereto.

Again, if this conveyance had been made in consideration of an actual release of the right of dower in property worth not to exceed one thousand five hundred dollars, the gross inadequacy of price would itself be a badge of fraud. The property conveyed is admitted to be worth not less than three thousand dollars, and the husband at the date of the conveyance was only about thirty-two years of age. His expectation of life was about thirty years, and the wife's but little more, if any. The value then of this right of dower at the date of the conveyance was very trifling compared with the value of the property conveyed, and is hardly worth estimating. The net income of five hundred dollars for a few years, receivable twenty-six years hence, and discounted to its present value, would nearly represent the alleged consideration for the conveyance.

But the defendant, Mary Jackson, further contends by an allegation in her answer and in the argument, that this bill cannot be maintained, because as she alleges, the judgment which it is brought in aid of is void for want of jurisdiction in the court that gave it over the subject-matter, in that the parties to whom the note was made could not maintain an action upon it in this court; and assigned it, if at all, to "the complainant herein for the purpose of bringing such action in this court."

Without stopping to determine whether this allegation is not a plea in abatement which is waived by an answer to the merits (*Livingston* v. *Story*, 11 Pet. 393; *Dowell* v. *Cardwell*, 4 Saw. 230), the question raised by it will be considered.

But before doing so, it is proper to dispose of the point made by the plaintiff, that the defendant cannot attack this judgment collaterally. I think she can; and that the case

falls within the rule, that when the right of a third person may be affected collaterally by a judgment procured by fraud or collusion of the parties thereto or which for any reason is erroneous and void, and he cannot bring a writ of error to reverse the same, he may allege and prove or show its invalidity in any proceeding in which it is sought to be used to his prejudice. (Freeman on Judg., sec. 335–337.)

The evidence upon this point is defective. It only appears therefrom that the firm of Hotaling & Co. consists of two persons—one a resident of San Francisco and the other of Portland—but what the nationality or citizenship of either of them is does not otherwise or further appear.

But it is altogether immaterial whether the plaintiff's assignor could have maintained an action upon this note or not. True, under section 11 of the judiciary act of 1789 (1 Stat. 78), the assignee of a contract, except a foreign bill of exchange, could not sue in the national courts, unless the assignor could have done so. But under section 1 of the judiciary act of 1875 (18 Stat. 470), this restriction upon the right of an assignee of a promissory note has been removed, and he may now sue in this court without reference to the citizenship of his assignor.

Nor is it material, if true, that the assignment to the plaintiff was made for the purpose or with a view of enabling him to sue on the note in this court. If the assignment was actually made and the interest of the assignor absolutely vested in the assignee without any agreement or understanding to return or account to the assignor for the proceeds, the motive or purpose of the latter in making the assignment does not affect the right of the assignee to sue in this court. This is well established both upon reason and authority. (*Newby* v. *The Or. Central R'y Co.*, 1 Saw. 63; *De Laveaga* v. *Williams*, 5 Id. 573; *Hoyt et al.* v. *Wright*, 4 Fed. Rep. 168; *Marion* v. *Ellis*, 10 Id. 410.)

In *Newby* v. *The Or. Central R'y Co.*, *supra*, in considering a similar objection to the plaintiff's right to sue herein, as the assignee of two of the defendants' bonds, the court said: "If it appears that the complainant has the legal title to or interest in these bonds, then this plea is insufficient. They

are payable to bearer and the title to them passes by delivery, unless the contrary is shown. The motive with which they were delivered to the complainant or he received them makes no difference in this respect. Parties have a clear right to become the owners of property, real or personal, by purchase or gift, for the express purpose of maintaining a suit in this court concerning the same."

And in *De Laveaga* v. *Williams*, *supra*, in which there was a plea in abatement, that the plaintiff was not the actual owner of the premises sued for and that the conveyance to him was merely colorable, to give the court jurisdiction, Mr. Justice Field said:

"There is no doubt, that the sole object of the deed to the complainant was to give this court jurisdiction, and that the grantor has borne, and still bears the expenses of the suit. But neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property if he chooses to do so. And the court will not, at the suggestion of a stranger to the title, inquire into the motives which induced the grantor to part with his interest. It is sufficient that the instrument executed is valid in law, and that the grantee is of the class entitled under the laws of congress to proceed in the federal courts for the protection of his rights. It is only when the conveyance is executed, to give the court jurisdiction, and is accompanied with an agreement to retransfer the property at the request of the grantor upon the termination of the litigation, that the proceeding will be treated as a fraud upon the court. Such was the case of *Barney* v. *Baltimore City*, upon which the defendants rely. (6 Wall. 280.) Here there was no such agreement; and it will be optional with the complainant to retransfer or retain the property."

The allegation or plea, therefore, in this case is absolutely immaterial; for it does not go so far as to aver that the assignment was not *bona fide*, and only colorable, but simply that the motive in making it was to give this court jurisdiction.

In the evidence there is an attempt to prove this, but it

is insufficient. The circumstances relied on as showing that the assignment was not absolute and unqualified, are that the consideration therefor was merely nominal—one dollar—and that the assignor paid the expenses of the suit. But these are not inconsistent with an actual transfer; and they signify nothing when taken in connection with the testimony of the assignor and assignee, who both state that the transfer was absolute, and that there is no understanding or agreement by which the assignor is to have any of the contents of the note or the fruits of the litigation.

It follows that the court had jurisdiction of the action on the note, and that the judgment therein is valid and binding on all the defendants herein for the purposes of this suit. The plaintiff is therefore entitled to have the conveyances of December 29, 1877, to the defendant Beauchamp, and Mary Jackson, so far as they hinder and delay him from obtaining satisfaction of his judgment, set aside and held for naught.

But it is a mistake to suppose that the property or any portion of it remaining after the satisfaction of the judgment will revert to the husband. As between him and his wife the conveyances are good and vest the title in her. They are not void, but only voidable at the suit of a creditor who is thereby prevented from the collection of his debt, and then only so far as to enable him to collect it. (*In re Estes*, 7 Saw. 460.) If there is any surplus of the property or the proceeds thereof, after satisfying the judgment of the plaintiff and the costs of this suit, as it is probable there will be, it belongs to the wife.

A decree will be entered setting aside the conveyances as to the plaintiff, and directing the master to sell the property or so much thereof as may be necessary to satisfy the plaintiff's judgment and the costs of this suit, and the execution of the decree herein, and pay the remainder of the proceeds, if any, to the defendant, Mary Jackson.

IN RE SOUTH MOUNTAIN CONSOLIDATED MINING CO.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
NOVEMBER 6, 1882.

1. LIABILITY—STOCKHOLDERS—MINING CORPORATION.—There being no *subscribed* stock, stockholders in *mining* corporations, organized under the laws of this State, are not liable, by contract, or by operation of law, to pay to the corporation the nominal par value of their stock, even though such nominal value has not been paid in.
2. NO CONTRACT TO PAY FULL AMOUNT OF STOCK.—Purchasers of stock in such corporations are not, by contract, or by operation of law, bound to pay to the corporation the nominal par value of their stock; their only liability is the constitutional, and statutory, personal, liability for their proportion of the debts and liabilities of the corporation, and the liability of their stock to assessment by the corporation.
3. POWER TO ASSESS NOT ASSETS.—The power to levy assessments by the corporation itself, is not an asset, or trust fund, and it does not pass as such to a court of bankruptcy; nor can such court enforce such liability of a stockholder to assessment by the corporation itself against stockholders of such corporations to discharge the liabilities of an insolvent mining corporation.
4. PERSONAL ACTION.—As to whether a personal action will lie against a stockholder to recover an assessment levied by such corporations, *quære?*

Before SAWYER, Circuit Judge.

Rhodes & Barstow and J. B. Crockett, for petitioners.

McAllister & Bergin, contra.

SAWYER, Circuit Judge. After a careful examination of this case, I have reached the conclusion, that the district court was right in its rulings upon the decisive points involved. The views of the district judge are stated in his opinion filed in the case, reported in 7 Saw. 31. I adopt generally those views, and they are so fully and clearly stated, that it is unnecessary to further elaborate the reasons given. There can be no doubt that the conclusion reached by the district court with reference to the responsibility of stockholders in ordinary mining corporations, as they have existed in this state, is in accordance with the opinion which has, heretofore, generally, if not universally, prevailed in the

state, since the passage of the law relating to corporations —now more than thirty years. To adopt the views maintained by the petitioner, would be to throw upon stockholders in mining corporations liabilities which they never, in fact, expressly contracted, or intended to contract, to assume; or ever supposed they had agreed to assume, even by implication.

The mode of forming mining corporations in this state, and the supposed liabilities assumed, are well known to everybody. They are, in California, as much a matter of universal knowledge, as the principle of natural philosophy, that water will seek, and, if unobstructed, find its level. A prospector finds, as he supposes, or a party, otherwise, obtains title to, a valuable mine. It requires capital to work it, which he does not possess. He goes to the money and business centers, where he finds capitalists, or parties who are in communication with capitalists, accustomed to organize corporations for the development of new mines, and makes such arrangements as he can. He presents such evidence of the value of his mine as he has obtained. Little is known of its real value. It may be worth nothing; and it may be worth many millions. Parties are found willing to take hold of the enterprise. They agree to incorporate, fix the capital stock at some purely nominal amount, and divide it into a certain number of shares, corresponding to the amount of capital adopted. The owner of the mine, for an agreed number of these shares, and in consideration of the promise of the other parties to assist in the development of the mine, conveys the mine, and receives for it the amount of stock agreed upon. The other parties, for their services in organizing and managing the company and its business, receive a large portion of the remaining stock, there being, usually, a considerable amount of the stock reserved by the company, which is put upon the market, and sold for such price as can be obtained, to raised a fund to procure machinery and develop the mine. The price of this stock is, of course, determined by the prospect of the mine, its location, its probable richness, and the confidence of the public reposed in the experience, ability, and character of those hav-

ing the management. This is the common mode of procedure. But it may be infinitely varied in detail and circumstance. No one, in fact, subscribes for any particular amount of stock, or expressly contracts, or intends to contract, to pay the nominal amount expressed in his certificate of stock, or supposes that he has so contracted, by implication or otherwise. Upon the organization of the corporation, by-laws are adopted, by which the liabilities of the stockholders are extended or limited, so far as admissible under the statute, according to their own views of expediency. This is, however, by contract, and depends upon their own volition. Then there are the limited personal liabilities for the indebtedness of the corporation, thrown upon the stockholders by the constitution and the laws of the state; and the liability to assessment prescribed by the statute, sometimes perhaps modified, or enlarged by the articles of association, and by-laws. Not only all those who organize these corporations in the mode indicated, and all who purchase the stock, or in any way deal in it, including those who buy the stock sold to raise a fund to develop the mine, but all who deal with the corporation, fully understand these matters, well knowing what the general understanding and practice is. I apprehend that a purchaser of stock in a mining corporation, with a mere nominal capital of ten millions of dollars, in the daily transactions of the stock board in San Francisco, would be very greatly astonished, in case the corporation should turn out to be bankrupt at the time, to find that he had, by his simple purchase, contracted to pay up his share of the ten millions, nominal capital, should that amount be found necessary, in a court of bankruptcy, to discharge the obligations of the corporation. Such a discovery would very soon close out all dealings in mining stocks, in such corporations, as they are now organized.

Mining corporations in California are, in these particulars, *sui generis*. They are organized and carried on upon principles, in these respects, wholly different from banking, railroad, insurance, and like commercial corporations having a *subscribed* capital stock. There is no agreement, express or

implied, to pay up any particular amount of stock, and no one understands that there is. Certainly, none is intended by the parties. If there is a contract to pay up the full nominal amount of the stock, it could be called in from time to time without regard to the liabilities, or needs of the corporation. There being no such agreement, there is no contract or agreement to pay up capital stock, which can constitute an asset of the corporation. There is a mere power of assessment for a specific limited purpose, under the statute and by-laws—not a contract to pay generally in instalments upon call; but this mere power to assess, independent of any contract, express or implied, to pay up the nominal amount of capital stock in instalments, is not an asset of the corporation, and counsel for the petitioner do not claim that it is. They insist that there is a contract to pay the amount of the capital stock, by implication, at least. There being nothing but a power to assess for a specific purpose, that power is not an asset, and it does not pass to the court of bankruptcy as such. The creditor, in my judgment, in this class of corporations, is limited in his remedy to be enforced *in invitum*, to the assets of the corporation, strictly such, and the restricted personal liability of the stockholders under the constitution and laws of the state. (See *Foreman* v. *Bigelow*, 4 Clif. 508.) I am not aware that it has ever been supposed till recently that there was any such remedy in this class of cases, as is now sought. Recent decisions of the courts in the eastern states in relation to commercial corporations having a *subscribed* stock, organized and carried on upon different principles, have suggested to creditors the application of the remedy to mining corporations. So far as my knowledge extends, this is the first instance in this state of any attempt to enforce a remedy, which could not have been contemplated by the creditors of this or any other mining corporation when the indebtedness was contracted. Should it succeed, it would, in my judgment, place the liability of all stockholders in the vast number of mining corporations in this state upon a basis entirely different from that upon which they supposed they stood at the time they became stockholders; and different from that prescribed by

the constitution and statutes of the state. Such a change should only be effected by express legislative action, and made applicable to the future. For a further discussion of the question see the opinion of the district judge cited. (7 Saw. 31.) I am not prepared to say now, that an assessment properly levied by the directors of a corporation, under the statute, may not be collected by a personal action, instead of by a sale of stock. I do not think it necessary to go so far to sustain the order of the district court, of which a review is now sought; and I therefore express no opinion upon that point either way.

I think the order of the district court should be affirmed. It is so ordered, and the petition for review dismissed.

UNITED STATES *v.* WILLIAM WATTS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.
NOVEMBER, 1882.

1. FUGITIVES FROM JUSTICE—EXTRADITION TREATY CONSTRUED.—An extradited fugitive cannot under the treaty of 1842 between the United States and Great Britain be held to answer for an offence for which his surrender could not have been asked and would not have been granted.

Before HOFFMAN, District Judge.

Philip Teare, United States attorney.

Daniel T. Sullivan, for defendant.

HOFFMAN, J. The prisoner having been arraigned on three indictments found against him in this court interposed a plea to the jurisdiction of the court to the effect that he had been extradited by Great Britain at the request of the United States, that the offences charged in the requisition, and on which he has been surrendered, are other and different offences from those alleged in the indictment to which he is now called on to plead, and that the said last mentioned offences are not mentioned or enumerated in the treaty

between the United States and Great Britain; wherefore he says that he cannot and ought not be put on his trial for such offences, or restrained of his liberty, except to answer to the offences for which he was extradited.

The validity of the claim set up on the part of the prisoner depends on the solution of two questions: 1. What is the true construction of the tenth article of the treaty of 1842 between the United States and Great Britain? 2. How far are the judicial tribunals of the United States and of the states required to take cognizance of and in proper cases give effect to treaty stipulations between our own and foreign governments?

At the outset of this discussion two propositions may be laid down as incontrovertible: 1. Whatever speculative views may have been taken by jurists of America as to the duty of sovereign states on grounds of comity or by the laws of nations to deliver up fugitives on the demand of foreign states whose laws they are charged with having violated, in the United States it has long been the established rule "neither to grant nor to ask for extradition of criminals as between us and any foreign government unless in cases for which stipulations have been made by express convention." (Opinions of Attorney-General, vol. 6, p. 431; *Commonwealth* v. *Hawes*, 13 Ky. 788; *Holmes' Case*, 14 Pet. 593; Lawrence's Wheat. on Inter. Law, 233.) 2. "A treaty is in its nature a compact between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished except so far as its object is infraterritorial, but is carried into execution by the sovereign powers of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision." (*Foster* v. *Neilson*, 2 Pet. 253, *per* Chief Justice Marshall.)

"When, therefore, it is provided by treaty that certain acts shall not be done or that certain limitations and restrictions shall not be disregarded or exceeded by the contracting

parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason that to do so would be, not only to violate the public faith, but to transgress the 'supreme law of the land.'" (*Commonwealth* v. *Hawes*, 13 Ky. 702.)

It results as a necessary consequence of the duty imposed on the courts to respect and obey the stipulations of a treaty as the supreme law of the land that they are also charged with the duty of determining its meaning and effect, and this duty they must conscientiously and firmly perform, even though the construction they feel compelled to give to it should differ from that given to it by the political branch of the government.

In the long and very able correspondence between Mr. Fish and Lord Derby, with reference to the extradition of Winslow, the position apparently assumed by the latter at the outset, to the effect that the British government might, by act of parliament, modify and introduce new conditions into an existing treaty with the United States, without the assent of the latter, seems to have been virtually abandoned.

The ground finally taken by Lord Derby was that "the act of parliament in question (that of 1870) imposed no condition new in substance upon the treaty of 1842, inasmuch as the true meaning of that treaty is that a person accused of a specified crime or specified crimes shall be delivered up to be tried for the crime or crimes of which he is accused, and an agreement between the two powers that the right of asylum equally valued by both shall be withdrawn only in respect of certain specified offences, implies as plainly as if it were expressed in distinct words that in respect of the offence or offences laid to his charge, and such offence or offences only, is the right of asylum withdrawn; and that as a consequence, independently of the act of 1870, it is the duty of each government to see that the treaty obligations in that respect are recognized and observed by the receiving power." (Lord Derby to Col. Hoffman, June 30, 1876.)

Mr. Fish, on the other hand, contended that the receiving

power has the right, if so inclined, after having tried the extradited person on the charge on which he has been surrendered, with a *bona fide* intent and effort to convict him on that one charge, to try him for any other offence of which he may have been guilty. (Mr. Fish to Mr. Hoffman, May 22, 1876; Message and Documents, Department of State, 1876-7.)

With this important and irreconcilable divergence of opinion between these eminent statesmen the correspondence terminated, and the United States for a time declined to make or entertain any demand for the surrender of fugitives under the treaty.

That it has since gone into operation is evident. But upon what adjustment, if any, of the controverted question the court is not informed. But it is understood that the assertion by the district attorney, of the right and of his purpose to try the prisoner for offences other than those for which he was surrendered and which are not extradition crimes, is not made under express instructions from the government.

The court, however, must regard him as its representative and as acting under its authority, and must determine the questions submitted to it as if his action were taken by its express direction.

There is no reason to suppose that when the treaty was negotiated, Lord Ashburton or Mr. Webster intended that the rights it conferred or the obligations it imposed should be other than those usually considered to result from similar agreements for the extradition of fugitives from justice. The opinions therefore of jurisconsults and writers of eminence on international law may profitably be considered, to ascertain what, in their judgment, are the rights and duties of the receiving power to whom a fugitive has been surrendered for trial for a specified offence.

In the memorable debate in the house of lords on Earl Granville's motion for further correspondence respecting extradition, the lord chancellor in an elaborate defence of the position assumed by Lord Derby reproduces the opinions of the great jurists of the continent whom he had consulted.

He cites Fælix, Kliut, and Heffter, and a case mentioned in Dalloy's Jurisprudence.

It is unnecessary to encumber this opinion by inserting at length the various citations from those authorities contained in the speech of his lordship. It will be sufficient to state one of the general rules laid down by Fælix: "The person who is surrendered cannot be prosecuted or condemned except for the crime in respect to which his extradition has been obtained." The other authorities are equally explicit. Indeed there seems, so far as I can discover, a common *consensus* of jurists on the subject. (See Am. Law Review, vol. 10, p. 618, and authorities cited.)

In the circular of the French minister of justice of 1841, the theory of the French law on the point under consideration is laid down with great fulness: "The order of extradition," he says, "states the act upon which it is founded, and that act alone should be investigated; whence it follows that if during the trial of the crime for which extradition has been granted proofs are discovered of another crime, a new demand in extradition must be made."

He goes further and holds that even if the surrender be made for a crime and also for a misdemeanor, the accused can only be put upon his trial for the former. After observing that "extradition should never be claimed or granted for trifling offences," he adds: "*Il faut une raison puissante pour faire rechercher sur la terre étrangère l'homme qui s'est puni par l'éloignement volontaire de sa patrie.*"

"Extradition can only be admitted with regard to a person accused of an act punishable with severe and degrading punishment (*peine afflictive ou infamante*), that is to say, of a crime other than a political crime, and not of a misdemeanor (*délit*). It follows. that if extradition has been obtained of a person accused at once of a crime and a misdemeanor he ought not to be put on his trial for the misdemeanor." (Cited in Clarke on Extradition, c. 11, p. 161.)

This rule would *a fortiori* apply when it is proposed to try the person extradited for an offence for which his surrender could not have been asked, and would not have been granted.

It is manifest from the foregoing that the position taken by Lord Derby finds abundant support in the opinions of continental jurists, and in the practical interpretation given by France to the rights acquired by the extradition of a criminal.

I now come to the treaty itself. It enumerates seven crimes for which the surrender of the fugitive may be demanded. It will not be disputed that this enumeration is exclusive, and that the fugitive can be demanded for the enumerated crimes and for none others. No clearer case for the application of the familiar rule *expressio unius est exclusio alterius* can easily be imagined. But if any doubt be felt on the point it will be dissipated by adverting to the language of President Tyler in his message communicating the treaty to congress: "The article on the subject in the proposed treaty is carefully confined to such offences as all mankind agree to regard as heinous and destructive of the security of life and property. In this careful and specific enumeration of crimes the object has been to exclude all political offences and criminal charges arising from wars or intestine commotions. Treason, misprision of treason, libels, desertions from military service, and other offences of a similar character are excluded."

It is true that the treaty does not in terms prohibit the trial of the surrendered fugitive for crimes other than those mentioned in the treaty. "But," as is well said by the supreme court of Kentucky in *Commonwealth* v. *Hawes*, "if the prohibition can be fairly implied from the language and general scope of the treaty considered in connection with the purposes the contracting parties had in view and the nature of the subject about which they were treating, it is entitled to like respect and will be as sacredly observed as though it were expressed in clear and unambiguous terms." (13 Ky. 704.)

To what end this careful and exclusive enumeration of offences if, after a surrender for any one of them, the person may be tried for other offences not included in the enumeration?

And what on such a construction becomes of the guaranty and safeguard relied on by President Tyler?

Can it be supposed that the eminent persons by whom the treaty was negotiated in effect, said to each other, "You shall not demand nor will we surrender a fugitive except for the enumerated offences, but if you can make out a *prima facie* case against him for an extradition crime, you may, after trying him for that crime and after an acquittal, which may show that he never should have been demanded or surrendered, try him for any other offence he may have committed?

Nor if this construction of the treaty be admitted is it easy to see how the surrendered person is protected from trial for a political offence. If he can be tried without violating the letter or spirit of the treaty for any non-enumerated offence, why not for a political offence? It has been said that public sentiment in Great Britain and the United States would render such a proceeding impossible.

But President Tyler rested the guarantees of immunity to political refugees on something more stable and reliable than the prevailing public sentiment of either country. He evidently thought that they were to be implied from the treaty itself.

It has been urged that the right of asylum for political offenders is so universally recognized as sacred and inviolable that an infringement of it was like a parricide at Athens, not to be treated as possible. But jurists of the same country are not always agreed as to what constitutes a political offence. Nor on a question so often difficult and delicate can it be expected that two governments will always be of one mind.

If then the right of the receiving power to try the surrendered person for any offence of which he may have been guilty (having first tried him *bona fide* for the extradition offence) be admitted, it might well happen that the receiving power might in perfect good faith hold the prisoner to answer for an offence which the surrendering power would consider strictly political in its character.

But the treaty is explicit that the surrendering power is the

sole and final judge, not only of the adequacy of the proofs submitted on a demand for a surrender, but of the question whether the facts proved constitute an extradition offence under its laws, and especially whether under those laws the offence is political in its character. On the construction contended for, this right would practically be denied, and the immunity of political offenders so jealously maintained and carefully guarded by both the contracting parties might thus effectually be destroyed.

The legislation of both Great Britain and the United States appears to have given a practical construction to the treaty in accordance with the views I am attempting to maintain. The British act of parliament of 1843, which was passed to carry into effect the treaty of the preceding year, provides (sec. 3) that "upon the certificate of a justice of the peace," etc., "it shall be lawful for one of her majesty's principal secretaries of state * * * by warrant, under his hand and seal to order the person so committed, to be delivered to such person or persons as shall be authorized, in the name of the United States, to receive the person so committed, and to convey such person to the territories of the United States *to be tried for the crime of which such person shall be so accused.*"

The words, "and for that crime alone," or "for none other," are not, it is true, found in the act, but the motive and object of the surrender are so explicitly stated that the statute on every principle of fair and rational interpretation should be construed as if those or equivalent words had been inserted.

The language of our own act of congress of 1848, is identical with that of the British act. It directs the person so committed to be delivered, etc., "*to be tried for the crime of which such person shall be so accused.*" The same language is used in the warrant under which the fugitive is surrendered.

But if by a fair construction of the treaty the extradited person, after being tried for the offence of which he has been "so accused," may be tried for any other offence,

neither the law nor the warrant express the whole object of the surrender.

Will it be contended that any secretary of state would venture under the act to issue a warrant directing the surrender of the fugitive to be tried for the offence of which he has been accused, and after such trial, to be tried for any other offence which may be charged against him? To put this question is to answer it.

I will now briefly advert to the authorities. The first to which I shall refer is the case of *The Commonwealth v. Hawes*, already frequently cited in this opinion, and the able, conclusive judgment in which I have freely availed myself of, without I fear adding much to its force. The prisoner had been surrendered by the authorities of the Dominion of Canada for the crime of forgery. On this charge he had been tried and acquitted. He was then required to plead to an indictment for embezzlement. The court refused to try him for that offence, and directed his discharge. The ruling of the court was unanimously affirmed by the supreme court of Kentucky on appeal.

It will be noted that this decision was rendered in April, 1878, long subsequently to the correspondence between Mr. Fish and Lord Derby, and with full knowledge of the decisions in *Caldwell's case* and *Lawrence's case*, hereafter to be noticed.

It will also be observed that in this case a state court declined jurisdiction of an offence committed within the territory of a state.

The court holds: 1. That the trial of extradited criminals for crimes other than those *named in the treaty and in the warrant of extradition* is not prohibited in terms by the treaty of 1842; but such prohibition is clearly implied from the language and general scope of the treaty, and this prohibition should be as sacredly observed as though it were expressed in clear and unambiguous language. 2. The right of one government to demand and receive from another the custody of an offender who has sought an asylum upon its soil, depends upon the existence of treaty stipula-

tions between them, and *in all cases is derived from and is measured and restricted by the provisions, express or implied, of the treaty.*

The same conclusion was reached by the supreme court of New York in the case of *Adrance* v. *Lagarve*, 1 Hun (Sup. C.), 689. The Court holds that "when the defendant was extradited it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. As to all other matters, being absolutely beyond the reach of the laws of this state, he was absolutely entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime for the commission of which he was removed from the protection of the laws of France. Beyond that, he was entitled to the protection of those laws so far as his personal liberty would have been secured by them in case no removal of his person had been made. In the language of the treaty, he was delivered 'up to justice' because he was accused of one of the crimes which it enumerated, and it was implied in his surrender that he should be at liberty to return again to France, when the purposes of justice had been performed in the charge made against him. The nature of the treaty as well as good faith with the foreign power entering into it will permit no other construction." The prisoner was in this case discharged from *arrest on civil process.*

This judgment was reversed by the court of appeals in 59 N. Y. 110—but not upon any claim that on the principles of international law or by the terms of the treaty a prosecution for an offence other than the offence for which surrender has been made was permissible. On the contrary the immunity claimed is pronounced by the court "eminently just in principle."

The decision turned upon the supposed inability of the court to interfere. After referring to the British act of 1870, the court observes: "Congress doubtless has power to pass an act similar to the English act referred to, as the whole subject is confided to the federal government. It has exercised this power by passing an act to protect fugitive

criminals from lawless violence. (15 U. S. Stat. at Large, 337.) *That these provisions ought to be extended to protection from other prosecutions or detentions I do not doubt, but until this is done by the law-making power by treaty or statute*, we feel constrained to hold that the courts can not interfere."

The question whether the treaty did not contain by necessary implication a prohibition against the prosecution of the offender for any other crime than that for which he is surrendered, does not seem to have been considered by the court, and much reliance is placed on the supposed interpretation of the treaty by the law officers of the crown in *Burley's case*—a case so frequently mentioned in the correspondence between Mr. Fish and Lord Derby.

The decision of the court of appeals was rendered in 1874, long prior to the protracted and exhaustive discussion of the whole question in that correspondence and the debates in the house of lords. It may be added that two judges, one of whom was Mr. J. Folger, the present secretary of the treasury, dissented.

The case of Caldwell (8 Blatchf. 131), upon the authority of which the subsequent case of Lawrence was decided by the same judge, appears to have been treated by him as a question, not of jurisdiction, but of privilege from arrest. The provisions of the treaty and the question considered by the Kentucky court as to prohibitions impliedly contained in it, do not appear to have been considered, nor is any reference made to the rules of international law, the opinions of foreign jurists, or the practice of civilized nations. The opinion seems to proceed on the erroneous supposition that Great Britain had definitively acquiesced in the construction contended for; and the case of Heilbroun, so fully explained in subsequent discussions, is cited as a precedent, if not an authority. The decision, it may be added, was rendered in 1871, five years before the case of Winslow arose. With the greatest respect for the eminent judge who decided this case, I am compelled to dissent from his conclusions.

The suggestion of the learned attorney general in his opinion on the case of Lawrence, that it was intended, at

least by Mr. Webster, by whom the treaty was probably drawn, to extend the practice with which he was familiar in cases of surrender of fugitives from justice between the states, to cases of fugitives escaping into Canada, admits of an obvious answer. The states of this union do not occupy towards each other the relation of foreign states in the sense in which that term is applied to Great Britain or France.

All the citizens of the states are citizens of the United States. They are in no sense aliens to each other. The distribution of powers between the states and the federal government requires that offences against state laws should be prosecuted within the jurisdiction the laws of which have been violated, but no right of asylum is gained by flight into another state.

If the offender has violated the laws of the United States, he may be arrested without requisition or extradition wherever found within the limits of the union.

The act of congress passed to carry into effect the constitutional provisions for surrender of fugitive between the states enacts that upon the demand of the executive authority of any state or territory for the surrender of any fugitive from justice, and on the production of an indictment found or an affidavit made before a magistrate of any state or territory charging the person demanded "*with treason, felony, or other crime,* certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested," etc.

Under this statute it has been held that no inquiry into the probable guilt of the fugitive can be made. The only inquiry is, whether the warrant on which he is arrested states that the fugitive has been demanded by the executive of the state from which he is alleged to have fled and that a copy of the indictment or an affidavit charging him with having committed "treason, felony, or other crime," certified by the executive demanding him as authentic, has been presented. Whatever the statutes of the demanding state make indictable, is a crime within the constitution

and law of congress on the subject. (*In the Matter of Clark*, 9 Wend. 212.)

As the fugitive may be demanded for any crime, and as the surrendering state has no power to inquire into his probable guilt, or whether the crime for which he is demanded is made such by its own laws, it follows that when surrendered he may be tried for any crime he may have committed. But that fact lends no countenance whatever to a similar claim on the part of the receiving power under an extradition treaty with a foreign nation.

It remains to be determined whether the immunity from prosecution for crimes other than that for which the fugitive has been surrendered can be enforced by the court or only by the intervention of the political branch of the government. This point has already been incidentally considered. If I am right in supposing with the supreme court of Kentucky that the treaty by necessary implication prohibits the trial of the offender for any offence but that for which he has been extradited, the question is answered.

The treaty is "the supreme law of the land," and as binding on the courts as a statutory enactment. If it contained an express prohibition the court would, beyond doubt, be deprived of jurisdiction. If by a just and reasonable interpretation the prohibition must be implied, the same result follows.*

It may be added that, assuming that the receiving power has no right to try the fugitive except for the offence for which he has been surrendered, the immunity so guaranteed is a right of the prisoner, and can be far more surely and conveniently asserted before the courts than by diplomatic

* The twenty-fifth section of the act of September 24, 1789, commonly known as the judiciary act, provides "that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, *treaties*, or laws of the United States, and the decision is in favor of their validity, or where is drawn in question the *construction* of any clause of the constitution *or of a treaty* or statute of or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party,

intervention. The wealthy and influential criminal might generally be able to secure the interposition of the surrendering government for his protection. But the poor and obscure offender might have no means of drawing the attention of that government to his case.

It would be inconvenient if not impossible for the ambassador of the surrendering power to keep his eye on every case of an extradited fugitive with a view of interposing in case he should be put to trial for any other crime than that for which he was surrendered.

If the protection of the fugitive be left solely to the political or executive power, the attempt to do so would be attended by peculiar difficulties. In cases where the extradition has been obtained for an offence against the laws of the United States the president could easily interfere by directing the district attorney to abandon the prosecution. But when the criminal has been surrendered for an offence against the laws of a state (as most frequently happens) neither he nor the governor of the state has any such power. The latter may pardon, but he cannot control the district attorney or the court. In his correspondence with Lord Derby, Mr. Fish declared his inability to give the assurance demanded by the latter. If, therefore, the immunity of the fugitive cannot be enforced by the courts, it can in the United States be effectively secured only by an amendment to the treaty or by an act of congress, as suggested by the court of appeals of New York, in the case heretofore cited. But this, for the reasons I have given, I believe to be unnecessary.

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under such clause of the said constitution, *treaty*, statute, or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error," etc.

"It is equally obvious, that the act in question is foreign to the judiciary department. The province of that department is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties, but it exercises this function only where contending parties bring before it a specific controversy. It has no concern with pronouncing upon the external political relations of treaties between government and government. This position is too plain to need being insisted upon." (Hamilton's Works, vol. 7, p. 79.)

The only question presented for decision in the present case is, whether a surrendered fugitive may be tried for an offence other than an "extradition crime." The principles attempted to be maintained and the authorities cited prohibit his trial for any other offence than that for which he has been surrendered. This prohibition, if rigorously applied, might often defeat justice. If, for example, the surrender be for an attempt to commit murder, and after surrender the person assaulted should die. Or if (supposing larceny to be an extradition crime) the fugitive should be surrendered for robbery or burglary, and on examination of the proofs they should be found insufficient to show the force in the one case, and the effraction of the premises in the other; or if he should be surrendered for larceny and the offence should turn out to be embezzlement, or *vice versa*, in these and similar cases the application of the rule would work a failure of justice.

But it would not be difficult to provide for them by new treaty stipulations. It might be agreed that the extradited offender should be tried for the crime for which he has been surrendered, or for some other extradition crime based on the same facts or growing out of the same transaction. In this or some other way the statesmen of the two countries, whose interests and objects in this matter are identical, could surely devise means which, while the right of asylum would be sufficiently protected, would at the same time prevent that right from being so used as to afford immunity for crime.

Demurrer overruled.

ON YUEN HAI COMPANY ET AL. *v.* NELSON F. ROSS AND GEORGE C. SEARS.

CIRCUIT COURT, DISTRICT OF OREGON.
NOVEMBER 22, 1882.

1. ROAD WORK—LIABILITY FOR, HOW ENFORCED.—A statute of Oregon provides that all male persons between certain ages "residing" in a road district shall be annually listed for road labor on or before April 15th;

and be liable to perform two days' work on the roads therein, and if any such person shall fail to do so after being assessed therefor and warned thereto by the supervisor, the latter may deliver a statement of such delinquency to the sheriff, with the amount necessary to discharge it, to wit, two dollars for each day's work, who shall thereupon collect the same by seizure and sale of the personal property of the delinquent; and if such property cannot be found out of which to make such tax, the sheriff shall demand the amount from any person indebted to such delinquent, and collect the same out of his personal estate, unless he makes oath that he is not indebted to such delinquent; and the sheriff shall receive for his services a sum equal to one fourth of such delinquent tax, besides his lawful fees, to be paid by the delinquent or collected with the tax. (Or. Laws, pp. 726, 727, secs. 21, 22, and pp. 769, 770, sec. 101, 102, 103.) *Held*, Semble, that a demand for a delinquent tax from a third person is not valid unless it appears therefrom: 1. That the officer had not been able to make the same out of the delinquent's property; 2. That it contained a statement or allegation to the effect that unless the party paid the amount or made oath that he was not indebted to the delinquent, the officer would proceed to collect the same out of his personal estate; and 3. That it was not for a greater sum than the tax, and one fourth thereof in addition, as a compensation to the sheriff for making the demand and receiving the money; and no other fees are demandable or chargeable thereon unless the officer is forced to make the collection by seizure and sale of property, for which he is entitled to the usual fees for such service, in addition to such one fourth.

2. IDEM—WHO LIABLE TO PERFORM.—Certain Chinese laborers came to this state to engage in labor upon public works, and on April 1, 1882, were in road district No. 8, in Multnomah county, at work on the construction of a railway from Portland to The Dalles and eastward, where they remained a few months, passing through and beyond the district as the road bed was completed, without any purpose or occasion to remain longer in the district or ever return there: *Held*, that they were not "residing" in said district on or before April 15th, within the meaning of the statute, so as to be liable to perform road labor therein.

Before DEADY, District Judge.

William H. Effinger, for the plaintiffs.

George W. Yocum, for the defendants.

DEADY, J. This suit is brought by a Chinese firm of this city called On Yuen Hai Company, composed of four persons whose names are given in the bill, and sixteen other such firms, composed of one or more persons each, to restrain the defendant Sears, as sheriff of Multnomah county, and the defendant Ross, as supervisor of road district No. 8 therein,

from collecting from them or the Oregon Railway and Navigation Company, by seizure and sale of their goods and chattels or otherwise, the sum of four dollars per head, claimed by said defendants to be due from each of one thousand four hundred and forty-nine Chinese laborers, in the employ of the plaintiffs as laborers upon the railway of the said O. R. & N. Co. Upon the filing of the bill, by consent of the parties, a preliminary injunction was allowed; and afterwards the cause was heard upon the bill and answer.

The bill is drawn upon the theory that these Chinese laborers were not only not liable to do road work in district No. 8, but that the proceeding taken by the defendants to enforce the payment of a money tax as a substitute therefor is wholly unauthorized by law.

By the laws of this state, it is provided that each road supervisor shall, on or before April 15th of each year, "make out in alphabetical order, a list of all persons liable to perform labor on the public roads, residing within his district," and assess two days' work on such roads to each of such persons. Females, persons under twenty-one and over fifty years of age, and those who are a public charge or too infirm to labor are exempt from road work; and any one may pay two dollars to the supervisor in lieu of any such days' work.

If any person subject to road labor as aforesaid, shall, after three days' notice from the supervisor "personally or by writing left at his usual place of abode," neglect or refuse to perform said labor, "such delinquent shall thereby become liable to the supervisor for the amount of his road tax in money; and such supervisor shall proceed at once to collect the same by levy and sale" of his property.

If sufficient property of the delinquent out of which to make the tax cannot be found, the supervisor must proceed against him by action, and the judgment therein may be enforced as for a fine in a criminal action. (Or. Laws, pp. 726, 728, secs. 21, 22, 24, 27.

Such was the statute until October 24, 1866, when "an act to facilitate the collection of taxes in certain cases" was passed, which provided as follows:

Sec. 1. "Any officers charged with the collection of any tax who cannot find personal property out of which to make the same, shall demand such tax from any person who may be indebted to such taxpayer, and shall collect the same out of his personal estate, unless he shall take and subscribe an oath that he is not indebted to such taxpayer, which oath may be administered by such collector."

Section 2 authorizes the assessor to collect the poll-tax at the time of assessing the same; and in default of such payment he is required to give the sheriff a list of such taxes, who must collect the same by the levy and sale of property, or "in the mode directed in the preceding section."

Section 3 provides: "If any person liable to perform labor on the public roads * * * shall fail to do so when warned * * the supervisor shall immediately give to the sheriff a statement of such delinquent road work * * * showing the amount that will discharge the same in money, and the sheriff shall immediately collect the same in the manner aforesaid, and pay it to such supervisor."

This section also provides that "the sheriff shall receive for his services," under said sections 2 and 3, "a sum equal to one fourth part of the delinquent tax, besides his lawful fees, to be paid by the delinquent, or collected with the tax." (Or. Laws, pp. 769, 770, secs. 101–103.

Upon this hearing, the answer is taken for true; and reading it in the light of the circumstances and the uncontroverted allegations of the bill, the material facts of the case appear to be as follows:

About February, 1882, these Chinese laborers came to Oregon and were employed upon the railway then being constructed by the Oregon Railway & Navigation Company, between Portland and Eastern Oregon *via* The Dalles, under contract with the plaintiffs to that effect, and that they have no fixed residence in the country and expect to return to China at some future day; that road district number 8 is a political division of Multnomah county, including, as appears from the public records thereof, all that portion of the county which lies to the east of the Sandy river, the west line of the same being about eighteen miles east of

Portland; that on April 1, 1882, said Chinese laborers were in said district at work upon the construction of said railway, the line of which runs through said district on the south bank of the Columbia river for the distance of about twenty miles, where they remained not to exceed four months thereafter, passing through and beyond the district as the roadbed was completed, without any purpose or occasion to remain longer therein, or to ever return thereto; that while said laborers were in said district and before April 15th, the defendant Ross, as supervisor of said road district, listed them as persons residing therein and liable to perform work on the public roads thereof, as No. 1, 2, 3, 4, etc., of the company by which they were employed, and did assess against each of them two days' work to be performed upon the roads in said district; that thereafter, and while said Chinese were still in said district, said supervisor did duly notify them by the description aforesaid to work on the roads of said district, which they neglected and refused to do, and being unable to find any property of said Chinese out of which to make said delinquent tax, said supervisor, on July 8th, delivered to the defendant Sears, as sheriff, a statement in writing thereof with the sum of money which would discharge the same; to wit, four dollars per head, "not including costs and expenses," and that thereafter, on August 12th, said sheriff did "garnish" each of the plaintiffs and the O. R. & N. Company by delivering to each of them true copies of said statement and "a notice of garnishment" to the effect "that by virtue of a warrant for the collection of road tax issued" by said supervisior to said sheriff "all debts, property, moneys, rights, dues, or credits of any value" in their hands or under their control, "and especially a certain sum of six dollars belonging to each of the Chinamen" in their employ, designated and numbered as aforesaid, "*is* hereby levied upon and garnished, and you are hereby required to furnish forthwith a written statement of all such property or credits."

The objection to the proceeding pursued by the defendants for the collection of this tax—that a garnishee process can not be maintained except in aid of an attachment or execu-

tion issued from a court of justice in a judicial proceeding, assumes that this is a technical garnishment and overlooks the statute (October 24, 1866, *supra*), which expressly authorizes the collection of delinquent road work or tax, in the contingency stated—when it cannot be made out of the personal property of the delinquent—by demanding and receiving the amount of the same from any debtor of the delinquent.

The fact that the defendant Sears appears to have erroneously assumed that he was acting under an ordinary garnishment, in an action at law, does not make the proceeding such an one or vitiate it, provided the statute governing it is substantially complied with.

The method of collecting or enforcing a tax is altogether within the discretion of the legislature, unless otherwise provided by the constitution. (Cooley on Tax. 36, *et seq.*)

Assuming then that this road labor was duly assessed upon these Chinese laborers and that they neglected to work it out or pay the equivalent in money, after being duly warned thereto, it became the duty of the supervisor to make and deliver to the sheriff a statement of the facts showing their delinquency in this respect, whereupon it became the duty of the sheriff to collect the amount due from each by a seizure and sale of his personal property, and in default of that, to demand the amount from any debtor of the delinquents, including the plaintiffs.

Whether these laborers were duly warned or not upon the facts stated in the answer is not free from doubt. But it is alleged in the answer that they were known by the numbers and designation used, and my impression is that it was sufficient.

The allegation in the supervisor's statement concerning the indebtedness of the plaintiffs and the O. R. & N. Company to the delinquents is unauthorized and superfluous. His duty is discharged when he furnishes the sheriff with a statement of the delinquency and the amount which will discharge it.

But the proceeding of the sheriff upon the supervisors' statement seems to have been very irregular if not illegal.

Instead of making a demand upon the plaintiffs for the payment of the delinquent tax or an oath that they were not indebted to them, accompanied by his own statement that he had not found any personal property out of which to make the same, he seems to have proceeded upon the assumption that he was executing a garnishee process in aid of an attachment or execution in a judicial proceeding, and without other demand or any statement as to the delinquents' property, served a notice upon the plaintiffs, such as is usual I suppose in cases of garnishment, stating that all money, etc., in their hands belonging to the delinquents, and "especially a certain sum of six dollars," were "thereby levied upon and garnished."

Now it is very doubtful if this is a demand at all, and if it should be so construed as for six dollars, I am quite certain that it was an insufficient and illegal one, for the reasons following: 1. It does not appear therefrom that the sheriff had endeavored and failed to make the amount out of the property of the delinquent, and therefore it does not appear that he was yet authorized to make any demand for it on a third person. It is true that it is alleged in the bill that the delinquents had no property out of which the money could be made. But that is not sufficient. It should have been so stated or alleged in the demand, as a necessary condition to the right to make the same.

This demand is a substantial step in an adverse proceeding, whereby a debt due to a delinquent taxpayer is in effect transferred to the sheriff or road district without the consent of either the debtor or creditor. The facts which authorize it to be made and will justify the debtor in yielding to it and constitute a valid discharge of the debt when paid to the sheriff, ought to appear upon the face of it. If the debtor pays upon an insufficient or unauthorized demand, the debt is not discharged and he is still liable for it to the taxpayer; 2. It is in excess of the sum due. The amount necessary to discharge the liability of each of these Chinese laborers was four dollars. The statute (Or. Laws, p. 770, sec. 103) provides that the sheriff shall receive for his services in this respect "one fourth part of the delinquent tax,

besides his lawful fees, to be paid by the delinquent or collected with the tax." If the amount is paid on demand, there can be no "fees" earned and the compensation of the sheriff is confined to this one fourth of the tax which he may include in the demand. He could only earn "fees" after a refusal to pay, in the seizure and sale of personal property, which would be the same, I suppose, by analogy, as for like services upon an execution. This demand then should have been for four dollars and the one fourth of that sum for the sheriff's compensation—five dollars in all.

The act of October 22, 1864 (Or. Laws, p. 727, sec. 25), authorizing the "supervisor" in the collection of a delinquent road tax to add "twenty per centum thereon," in case the same is not paid until after a levy upon the delinquent's property, has no application to this proceeding by the "sheriff" to collect a tax under the act of October 24, 1866, *supra;* and if it had, it does not authorize the demand or collection of this twenty per centum until after a levy. But the two penalties of one fourth and twenty per centum of the tax are not cumulative. They are given by different acts which provide for different proceedings under different officers; and even with the twenty per centum added to the one fourth, the amount would be only five dollars and eighty cents, instead of the sum demanded—six dollars.

Besides this, I am strongly of the opinion, that a valid demand of a delinquent tax from a third party on the grounds of his indebtedness to the delinquent, should not only show upon its face that the amount could not be made out of the personal property of the latter, but should also contain a statement or allegation, to the effect, that unless the same was duly paid by such party or he made his oath that he was not indebted to the delinquent, the amount of the tax and penalty together with the accruing costs or fees would be collected out of his personal property by seizure and sale thereof.

But I will not rest the decision of this case upon the insufficiency of this demand. The question was not argued upon the hearing—the counsel for the plaintiffs having rested his objection to the validity of the proceeding upon

the ground, that the act of October 24, 1866, *supra*, did not apply to the collection of a road tax at all, and therefore this tax could not be demanded or collected from any creditor of the delinquents except by means of a regular garnishment in aid of an execution issued upon a judgment at law, under the act of October 22, 1864, *supra*, against such delinquents therefor.

Waiving therefore the further consideration of the mode of proceeding to enforce the tax—were these Chinese laborers liable to perform road labor in district No. 8 under the circumstances of their presence there?

The provisions of the statute upon the subject are somewhat indefinite, but it is evident from what is provided and from the nature of the case, that persons only transiently in the district are not within its purview or operation. The party must be "residing" within the district, when the "list of persons liable to perform labor on the public roads" is made by the supervisor—that is, on or before April 15th; and the notice to labor, if not served on him personally, must be left at his usual place of "abode."

The legal definition of the cognate terms residence and domicile vary with the circumstances of the case and the mental constitution of judges and authors. The differences of definition and application of the terms in various circumstances may be seen in Abb. L. Dic., "Reside."

Residence generally imports a personal presence, whereas, one may have a domicile in a place from which he is absent most of the time. But residence implies more than a temporary sojourn in a place.

Personal taxes are generally imposed in the place of one's domicile—the place of his fixed habitation without any present intention of removing therefrom (Story on Conf. L., sec. 43; Whart. on Conf. L., secs. 74, 80; *Thorndike* v. *City of Boston*, 1 Metc. 242), but doubtless a person may be a resident elsewhere than at the place of his domicile for such a length of time and under such circumstances as to be liable to personal taxes there.

A citizen of a foreign state, or one of the United States, who comes to Oregon in the pursuit of business or other-

wise with the intention of remaining here some years, and then returning to his home or domicile, becomes a resident of the state, and liable, like other residents, to pay poll and other personal taxes in the county or district in which he may live.

But it is not enough that a person is a resident of, or even domiciled in the state; he must also be a resident of the particular road district in which he is assessed for road labor. To make a person a resident of such a district so as to become liable to do road work therein, in my judgment, he must inhabit the same with the intention of remaining there indefinitely, or at least have resided therein a year. The duty is an annual one—to be performed once a year—and this circumstance itself sheds some light upon the relation which the party is presumed to sustain to the locality in which he is expected to work. In effect, the statute provides that certain residents of the road district shall work the roads once a year, and it is but reasonable to conclude, in the absence of anything to the contrary, that the statute contemplates that such residents shall have enjoyed the privilege of at least one year's inhabitancy of the district before the corresponding duty of working the road begins. The road tax upon property in the district is assessed by the assessor at the same time this personal tax is, but not upon the property *then* owned by the resident, but upon that contained in the assessment of the preceding year for state and county purposes.

This construction of the statute makes the provisions for the personal and property tax harmonize, as they should. The latter is levied upon the property of the past year and the former upon the residence or inhabitancy of the same period. By this means the burden of maintaining the roads of a district is so far equally imposed upon the property and persons therein.

It is not denied that the legislature may provide that every person who is found in a particular road district on a certain day in the year shall be liable to do road work therein for that year; and while it is not probable that any such extreme measure will be resorted to, it would be well

to have some practical definition of what constitutes a residence in a district necessary to make one liable to do road work therein.

Attention has not been called to this subject, because, I suppose, as is well understood, only the permanent residents of a district have usually been required to work the roads; and if these laborers had been European instead of Asiatic foreigners, it is not probable that any one would have thought of attempting to make them work the roads, under these circumstances, as residents of road district No. 8. The statute makes no discrimination in this matter between Chinese and other foreigners, and it is not only contrary to the treaty with China, but to the dictates of natural justice, that any should be made in the administration of it.

My conclusion upon this branch of the case is, that these Chinese laborers were never residents of road district No. 8 within the meaning of the statute, but only persons transiently there—persons passing through the district in the construction of the Oregon Railroad and Navigation Company's railway, and therefore they were never liable to perform road labor therein.

No question has been made as to the right of the plaintiffs to maintain this suit, and I suppose there is no doubt but they may upon the ground of preventing a multiplicity of suits. (2 High. on Inj., sec. 1308.)

A decree will be entered for a perpetual injunction and costs.

BUCKLEY v. GOULD & CURRY SILVER MINING CO.

CIRCUIT COURT, DISTRICT OF NEVADA.
NOVEMBER 9, 1882.

1. NEGLIGENCE OF FELLOW-SERVANT.—The employer is not liable to a servant for an injury resulting from the negligence of a fellow-servant in the same line, or department of employment; provided the employer exercises due care in the selection of competent servants.
2. WHO ARE FELLOW-SERVANTS.—The runner of a steam-engine employed in lowering men and material, and hoisting rock in sinking a shaft, is a fellow-servant in the same line, or department of service, within the rule,

with the men in the shaft engaged in excavating the shaft and loading the rock to be hoisted.

3. NO WARRANTY—ONLY DUE CARE REQUIRED.—The employer does not warrant the competency of his servants. He is only bound to exercise due care in the selection of careful and competent men for the service to be performed.

4. EVIDENCE OF INCOMPETENCY.—The mere fact that an accident occurred, though evidence of negligence on that particular occasion, is not, by itself, sufficient evidence to authorize a jury to find that the party so negligent is not a careful and competent man for the service in which he was engaged.

5. INSTRUCTION TO JURY IN ABSENCE OF EVIDENCE.—Upon the close of plaintiff's testimony, if the evidence is insufficient to justify a verdict for plaintiff, the Court will instruct the jury to find for the defendant.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

This case was tried by a jury. At the close of plaintiff's testimony, the defendant's counsel asked the court to instruct the jury to find a verdict for the defendant, on the ground that there was not sufficient testimony to go to the jury, or to justify a verdict in favor of the plaintiff.

W. E. F. Deal, for plaintiff.

B. C. Whitman and M. N. Stone, for defendant.

By the Court, SAWYER, Circuit Judge, delivering an oral opinion:

We have carefully considered the motion to instruct the jury to find a verdict for defendant in this case. The main question is, whether the engineer—runner, as he is termed, of this engine—is a fellow-servant with the plaintiff in this case, within the meaning of the rule, which asserts the principle, that the master is not liable for an injury resulting to one servant from the negligence of a fellow-servant in the same line of employment. We are fully satisfied that he is a fellow-servant within the principle, and meaning of the rule. We have no doubt on that point. We do not think *Hough* v. *Railway Company*, 100 U. S. 213, cited by the plaintiff, militates against that proposition. On the contrary, we think it is an authority directly in favor of defendant in this case. The court in that case recognizes the

rule; it does not question it; it only notices the distinction which takes that case out of the rule.

Mr. Justice Harlan, in delivering the opinion, says that the English authorities go much further in favor of the doctrine of the immunity of the master from responsibility for injuries received by a servant in consequence of the negligence of his fellow-servant in the same line of employment, than the American courts. But the decision in *Hough* v. *The Railroad Company* is put upon another ground, namely: that the act complained of in that case, was the act of the company itself. A corporation must always act through its agents. The rule is recognized, that the company is bound to use all reasonable care and diligence in furnishing suitable and safe machinery for its servants to work with. In that case there was a violation of that rule. The defendant did not furnish a good and sufficient cow-catcher, and steam whistle. The accident occurred in consequence of the improper condition of the locomotive engine. The engine ran off the track by reason of a defective cow-catcher, and the steam whistle was blown, or knocked off, in consequence of not being properly fastened, and the engineer was scalded to death by the escaping hot steam. It was the duty of the company to use all reasonable diligence to furnish a safe engine. To furnish a safe engine is one thing, but its management by the engineer is quite another. The engineer was simply an employee, working with the machinery. That machinery had to be furnished by those charged with that duty. Those men in charge, furnishing and supervising the engine, were the agents of the corporation for that purpose. This service could only be performed by a corporation through agents. Therefore, their acts were the acts of the corporation, and not merely of fellow-servants. They were the acts of the corporation, through its agents, in furnishing machinery to work with. The decision is put upon that ground alone, and the court recognizes it as not being within the rule. It would have been the same in this case, if the engine that was used in this mine had been a rickety, defective old engine, out of order, and the accident had resulted from the use of that engine in

consequence of its defects. Then this case would have been precisely like the one cited.

But the foundation of this action, is, that the accident was the result of the carelessness of the man who was running the engine. He was not an agent of the company. He had no authority over the plaintiff. He was merely a workman running an engine under the direction of a chief engineer, a general foreman, and a superintendent of the mine. It was not his business to furnish the engine. He had no authority whatever. He was co-operating with plaintiff in sinking the shaft. He was simply a fellow-servant co-operating in sinking the shaft. We do not think it makes any difference whether he was running an engine, or working with a wheel and axle, a pulley and bucket, or carrying the material up and down a ladder upon his shoulders. He was doing the same work, but doing it by different means. Every man below performed his part of the work in sinking the shaft—the work in which they were all engaged. They were working together in the same department in excavating this shaft. The fact that the engine-runner, as he is called, was using a different instrument in carrying the material up and supplies down makes no difference. It was work done in a common employment, to accomplish a common end—the sinking of a shaft. One servant performed one part, and another, another part.

In the old Spanish mines, in early days, and even yet in some parts of Mexico and South America, the ore is carried in sacks upon the backs of men by climbing up and down ladders, instead of using an engine. In sinking this shaft, if instead of the steam-engine used in carrying down the fuse and powder for a blast—the work actually engaged in at the time of the accident—or in raising the rock, the party running the engine had gone up and down a ladder, carrying the material used in mining down and the rock up, we apprehend that no one would have asserted that he was not a co-servant in sinking the shaft—that he was not performing a common service in the same line or department of employment with those below. The fact of using another

appliance does not change the character of the act; it was the same work. The authorities go to that extent. Take the case of *Wood* v. *New Bedford Coal Company*, 121 Mass. 252. The plaintiff was a laborer employed in hoisting coal by machinery operated by a steam-engine. When it was hoisted to a certain height the man running the engine was to stop it. There was a man near the point where the coal was discharged to manage and empty the coal by means of a crank. The engineer hoisted the bucket too high, so that it went past the point where he should have stopped it, and thereby the man at the crank was struck by it and severely injured. In that case the engine-runner, and the man at the crank aiding to discharge the coal, were held to be fellow-servants in the same department of employment, and the company not liable. That is in all respects like this, at least, so far as the principle is concerned.

Again, in *Kelly* v. *Norcross*, 121 Mass. 508, the carpenters were charged with building a staging. The employers furnished suitable materials, and committed the duty of building the staging, to the carpenters, who had charge of the work themselves. The carpenters were superintending the construction of the staging, and the accident resulted from their negligence. An accident happened by which the staging fell and injured some of the laborers. They were held to be fellow-laborers within the rule.

In another case, *Holden* v. *Fitchburg Railroad*, 129 Mass. 268, the head-note reads: "The rule of law that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant, is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other; but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman of higher or greater authority than the plaintiff. A railroad corporation is not liable to a brakeman

on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its railroad."

In this case parties were employed in widening the road, and for the purpose of performing that work a derrick was erected. That is no part of the business of running a railroad. It is widening a road—enlarging its facilities. A train coming along, this derrick fell and a brakeman passing this wreck was injured by a rope attached to the fallen derrick. He was engaged in running the train. The other men were engaged in widening the road for the company. They were held to be fellow-servants within the meaning of the rule. If they were so, these parties here must be fellow-workmen.

In *Cooper* v. *Mil. & Pra. du C. R. Co.*, 23 Wis. 669, a flagman, who failed to properly notify the train of a break in the road, was held to be a fellow-servant with a brakeman on the train, killed in consequence of the negligence. So, also, in a Wisconsin case, where a train went out to clear the track of snow. They had a party of snow-shovellers designed to shovel snow off the road. The conductor concluded to clear the road at a certain point with a snow-plow. He made a rush into the snow with his snow-plow, and the result was that the train was thrown from the track. One of the snow-shovelling party going to his work was injured. The snow-shoveller injured was held to be a co-laborer in the same employment with the conductor, and the employer not liable on that ground. (*Howland* v. *Mil. L. S. & W. R. R. Co.*, 13 The Reporter, 607; also see cases cited.)

In Michigan an engineer and conductor of freight trains are held to be fellow-servants. (*Mich. C. R. R. Co.* v. *Dolan*, 32 Mich. 510.) In *Collier* v. *Steinhart*, 51 Cal. 117, it was held that the engineer running the engine to hoist water from a mine, by whose carelessness a tub of water fell upon a laborer at the bottom of the mine and injured him, was a fellow-servant with the party injured, within the rule.

So in *McLean* v. *Blue Point Gravel Mg. Co.*, Id. 257, McLean being in the hydraulic department, was injured by the

carelessness of Regan, foreman in the blasting department of the "general business." McLean and Regan were held to be fellow-servants within the rule.

These are only a few of the many cases found in the books which illustrate this point. We do not find anything against it. The case of *Kielley* v. *Belcher Silver Mg. Co.*, 3 Saw. 500, on the trial is a similar case. We do not think the decision on the demurrer in that case militates against the principle. (Id. 437.) The judge who delivered the opinion on the demurrer concurred in the opinion at the trial. They were not considered to be in conflict. We think the plaintiff and this runner of the engine were in the same line of employment, and, substantially, in the same department of service. There can be no recovery for any injury resulting from the negligence of his co-servant on that ground. There is nothing, then, to go to the jury on that point.

The next point is on the allegation in the complaint that the company employed an unskilful engineer. That allegation falls short of being sufficient. The company is not bound under all circumstances, and at all events, to employ a skilful and competent engineer. It is only bound to exercise due diligence, and care, in that respect. It does not warrant that he shall be skilful, but it is bound to use due diligence in providing or employing a skilful and competent engineer. It may have fully performed that duty. If it did, it is not liable. There is no allegation that it did not exercise due diligence or was negligent in this respect; but the fact only is alleged that the engineer was unskilful. Conceding it to be otherwise, there is no testimony here to show that this engine-runner was not a competent party. The only testimony is the fact that in this instance an accident happened. An accident may happen to the most competent and skilful man. He may have for years been without fault, and the fact that in this instance he was negligent is not inconsistent with the idea that he was generally a careful man, and entirely competent to perform the duties which he performed. And the mere fact of the single accident, although evidence of negligence in that particular instance, is not sufficient evidence, as held by many authorities, of

incompetency or that he is not a careful man. Quite a number of cases to that effect were cited on the argument, and none have been cited to the contrary. In *Wood* v. *Bedford Coal Company*, 121 Mass. 252, it was alleged that defendant knowingly employed an incompetent engineer. The accident happened, yet the court says: "The declaration alleges as one ground of the defendant's liability that it knowingly employed an unskilful and incompetent person as engineer. The plaintiff does not contend that there was any evidence to support this allegation."

Even counsel for plaintiff did not contend that the accident was evidence of the incompetency of the engineer. "The difficulty of the plaintiff's case is that the evidence clearly shows that the injury to him was caused by the negligent act of a fellow-servant." Just so in this case. There is no evidence here upon this point.

Again in the case of *Kelley* v. *Norcross*, before cited, where the staging fell, the accident happened, but the court said: "There was no evidence that the men were not in all respects competent workmen, or that the materials provided were unsuitable; and, without some such evidence, there was upon these points no question upon which the plaintiff was entitled to go to the jury. If there was neglect on the part of the carpenters, either in the construction of the staging or in leaving it, after it had been partially constructed to be continued or completed by the masons, it was the neglect of the fellow-servants of the plaintiff's intestate, who were competent to have properly performed the work." The mere fact of the negligence was held to be no evidence to go to the jury.

In *Cooper* v. *The Milwaukee and Prairie du Chien Railway Company*, 33 Wis. 671, it was said: "But all this is to no purpose, so long as it is not shown that the company, its officers, or agents, were negligent in the employment of these persons, or in retaining them in its service. The negligence of the company, its officers, or agents, in employing careless and unfit servants, is the gist of the action; and unless this be shown there can be no recovery. * * * * Aside from the proof of negligence in the servants on

the occasion in question, which is, clearly, not enough to charge the company, there is not the slightest evidence showing, or tending to show, negligence on the part of the company in the employment of those servants."

This case is directly in point. These are only a few out of a great many cases deciding that question. There is not a particle of evidence, other than the fact of the accident, in this case, that this engine-runner was not entirely competent, or that he was not a careful man. The testimony of the plaintiff shows that the engine-runner had been an engineer long before he went on this mine, and that plaintiff knew it.

The mere fact that he was negligent at this time is not sufficient evidence of his incompetency. There are numerous cases to the same point. There is no testimony sufficient to go to the jury to show his incompetency. And not only must it appear that he was not in fact incompetent, but also that the company did not use due care in employing him. If the allegation were sufficient, there is nothing to show on any of those points that the defendant is liable.

The only other point is, as to whether there is anything to go to the jury upon the question of the bell. We are satisfied, on that point, that there is nothing to justify the jury in finding that the accident resulted from the breaking down of that bell. On the contrary, the testimony shows that the accident resulted from the negligent act of the runner of the engine. No one testifies that plaintiff could have escaped if the bell had been there. The testimony of plaintiff's witness, Cumelford, is that he could not have got out—that there was not sufficient time had the bell rung. The cage came down so rapidly that he could not have got out of the way. There is no testimony that he could have got out of the way. The testimony is that the cage, ordinarily, came down to the place where the bell was and stopped, and only came down from that point at a given signal from below. But this time it did not stop. It was the ordinary practice to stop it within fifty feet of the bottom and there wait until the signal to lower it was

given, and then to lower it slowly. But at this time it not only came down without stopping, but it came rapidly.

At the time of the accident it came down with great rapidity. The engineer did not even stop the engine when the cage reached the bottom, for there were some forty feet of cable piled up on top of the cage. The testimony clearly shows, and there is nothing to the contrary, that the accident resulted purely and solely from the carelessness of the engineer in dropping the cage down at a rapid rate, without stopping or giving any notice. The accident, therefore, resulted from the negligence of a co-laborer in that employment. If the jury were to find, upon such testimony, that the accident resulted from the absence of this bell, we should be compelled to set aside the verdict. We feel bound, therefore, under repeated rulings of the supreme court, to grant the motion, and we shall so instruct the jury. Instruction and verdict accordingly.

UNITED STATES *v.* ROBERT A. SHINN.

CIRCUIT COURT, DISTRICT OF OREGON.
DECEMBER 16, 1882.

1. AFFIDAVIT USED UNDER TIMBER CULTURE ACT.—By virtue of section 5 of the crimes act of March 3, 1857 (11 Stat. 250), and section 6 of the timber culture act of June 14, 1878 (20 Stat. 130), an affidavit taken before a county clerk of this state, may be used before the register and receiver, in any proceeding or question arising under said last named act in which an affidavit is allowed or authorized by any law of the United States or regulation of the land department thereof; and if such affidavit is willfully and knowingly or corruptly false in any material matter, an indictment for perjury may be maintained theron in the proper United States court.
2. PERJURY.—Swearing to a false statement is not perjury unless the matter is material to the issue, question, or purpose about or for which the statement is made, or unless it is intended and calculated to give probability to a material statement or credibility to the affiant.
3. TIMBER CULTURE ACT—COMPLIANCE WITH.—A person entering a quarter section of public land under the timber culture act, must break not less than five acres thereof within a year after his application there-

for, and cultivate the same in some annual crop the next year, or it will be deemed abandoned; and planting the five acres in timber or cuttings, is not such cultivation.

Before DEADY, District Judge.

James F. Watson, for the United States.

G. W. Walker and Cyrus Dolph, for the defendant.

DEADY, J. By the act of March 13, 1874 (18 Stat. 21), "to encourage the growth of timber on the western prairies"—commonly called "the timber culture act"—it is provided that any head of a family or person of the age of twenty-one years, etc., "who shall plant, protect, and keep in a healthy growing condition for eight years, forty acres of timber, the trees thereon not being more than twelve feet apart each way, on any quarter section of the public land," or in like proportion on any less legal subdivision thereof, shall be entitled to a patent therefor, at the expiration of eight years, and on making proof of the facts.

A party applying for the benefit of the act must make affidavit that the "entry is made for the cultivation of timber," and on filing the same with the register and receiver, and on payment of ten dollars, he shall be permitted to enter the quantity of land specified.

A party entering a quarter section under the act must also "break ten acres" thereof the first year, ten the second, and twenty the third year after the date of such entry, and "plant ten acres of timber the second year," ten the third year, and twenty the fourth year after such entry; and in a like proportion for any less subdivision.

If, at any time after the application and prior to the issuing of the patent for the land, the claimant shall abandon it or fail to comply with any of the requirements of the act, the same "shall be subject to entry under the homestead laws or by some other person under the provisions of this act;" the party making claim to said land either "as a homestead settler or under this act," shall, at the time of filing his application, give such notice to the "original claimant" as

may be prescribed by the land office; "and the rights of the parties shall be determined as in other contested cases."

By the act of June 14, 1878 (20 Stat. 113), this act was amended so as to require the party to plant and keep only one fourth the number of acres in timber, and "to break or plow five acres" of a quarter section "the first year, five acres the second year, and to cultivate to crop or otherwise, the five acres broken or plowed the first year;" the third year to cultivate in like manner "the five acres broken the second year, and to plant in timber, seeds, or cuttings, the five acres first broken or plowed, and to cultivate and put in crop or otherwise, the remaining five acres, and the fourth year to plant in timber, seeds, or cuttings the remaining five acres;" and in a like proportion for any less subdivision.

Parties who had made entries under the act of 1874 are allowed by the act of 1878 to complete the same, by complying with the provisions of the latter act.

On March 4, 1882, the defendant was accused by the grand jury of the crime of perjury in making an affidavit to institute a contest concerning a tract of land claimed under these acts. The defendant demurs to the indictment, for that, the facts stated therein do not constitute a crime.

From the indictment it appears that on January 7, 1878, one Reuben Kinney, entered at the office of the La Grande land district, upon application No. 77, the north-west quarter of section 28, in township 5 north, of range 34 east, of the Wallamet meridian, situate in Umatilla county, Oregon, under the timber culture act of March 13, 1874, *supra;* that on January 31, 1881, the defendant made an application to the register and receiver to enter said quarter section under the timber culture act as having been abandoned by the original claimant, and for the purpose of procuring a contest between himself and Kinney concerning the right of the latter to the premises, at the same time filed an affidavit subscribed and sworn to by himself on January 28, 1881, before the county clerk of said county, in which it was stated that Kinney had not complied with the act under which he had entered the land in these among other particulars:

"1. That said Reuben Kinney did not at any time within one year from the date of his said entry No. 77, break or plow five acres or one sixteenth of the land covered by said claim, and did not in fact do *any* plowing upon said claim during the first year after filing said claim. 2. That said Reuben Kinney did not at any time during the second year or at any time prior thereto, cultivate by raising a crop or otherwise, five acres or one sixteenth or any other portion of the land included in said claim No. 77;" upon which perjury is assigned as follows:

That the said affidavit is wilfully false and not according to the truth in this: 1. The said affidavit states that the said Kinney "did not in fact do *any* plowing on said claim during the first year after filing said claim (meaning application 77 aforesaid), whereas in truth and in fact, and the defendant well knew it so to be, the said Kinney did *some* plowing on said land during the spring of 1878; 2. The said affidavit states that said Kinney "did not at any time during the second year or at any time prior thereto, cultivate by raising a crop or otherwise, five acres or one sixteenth or *any other portion* of the land included in said claim No. 77," whereas in truth and in fact, and the defendant well knew the fact so to be, the said Kinney did, during said second year, cultivate the said tract of land, and did, "in the month of January, 1879, plow ten acres of said land, and in December of said year did harrow and cross-harrow said ten acres and mark the same in squares four feet apart each way, and did, during said December, plant seven acres of said ten acres to cuttings, placing one slip or cutting at the corner of each of said squares."

On the argument of the demurrer the following points were made: 1. That the county clerk was not authorized or empowered to administer the oath in question; 2. That the first assignment of perjury is upon an immaterial statement in the affidavit, and the second one does not show the falsity of the statement upon which it is made, and therefore no crime is charged in the indictment.

It was also assumed that the indictment was found under section 5392 of the revised statutes, which substantially

provides that a person who takes an oath before a competent officer in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, and then "wilfully and contrary thereto states any material matter which he does not believe to be true," is guilty of perjury.

Doubtless this section is comprehensive enough to include this case if the clerk of the state court was authorized by any law of the United States or regulation of the land office to administer the oath. (*United States* v. *Bailey*, 9 Pet. 238.) The fact of its being taken before a state officer authorized "to administer oaths generally (Or. Code of Civ. Pr., sec. 856), and that it was actually used in a case in which the law of the United States authorizes an oath to be used, may of itself be sufficient to bring the case within the section. (*United States* v. *Bailey*, *supra*.)

Nor does it expressly appear that a person attempting to claim an abandoned timber culture entry is authorized or required to file with his application therefor a statement of the facts constituting such abandonment, or if so, to make oath thereto.

But it is understood to be the practice in the land department, that when one person desires to enter land under the homestead or pre-emption acts already covered by the entry of another, which he deems invalid or abandoned, that the former makes and files with the register and receiver a verified statement of the facts constituting such invalidity or abandonment, upon which such officers, if they deem the matter sufficient, "institute," as it is called, a contest between the parties, in which evidence is taken pro and con and a decision made for or against the entry.

In 4 Copp's Land Owner, 21, there are two decisions by the secretary of the interior under the timber culture act (March 19 and April 2, 1877), in which the statement by the contestant concerning the entry of the other is denominated an "affidavit of contest," and recognized as a lawful and authorized part of the proceedings.

The act (section 5) authorizes the commissioner of the general land office to make rules and regulations for carry-

ing it into effect, and provides that contests under it shall be determined as in other cases.

But the act (section 6) expressly provides that section 5 of the crimes act of March 3, 1857 (11 Stat. 250), "shall extend to all oaths, affirmations, and affidavits required or authorized" thereby. The effect of this provision is, to make said section 5 a part of the timber culture act and to provide that an indictment for perjury committed in taking an oath authorized by it must be found and is triable under said section, rather than section 5392 of the revised statutes.

This section provides "that in all cases where any oath, affirmation, or affidavit * * * shall be made or taken before any person authorized by the laws of any state or territory of the United States to administer oaths or affirmations or take affidavits, and such oaths, affirmations, or affidavits are * * * used or filed in any of the said local land offices [of the United States] or in the general land office, as well in cases arising under any or either of the orders, regulations, or instructions, concerning any of the public lands of the United States, issued by the commissioner of the general land office or other proper officer of the government of the United States, as under the laws of the United States, in any wise relating to or affecting any right, claim, or title, or any contest therefor, to any public lands of the United States, and any person or persons shall, taking such oath, affirmation, or affidavit, knowingly, wilfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offence by the laws of the United States."

The county clerk is an officer authorized to administer oaths by the laws of this state, and the oath in question was filed and used in a local land office of the United States, in relation to a claim to a portion of the public lands, and to effect a contest for the same. Assuming, then, as I do, that this affidavit, made and used as it was, is an act or proceeding authorized or recognized by the regulations of the land department, as a means of instituting a formal inquiry into the validity or abandonment of a prior entry of a tract of

the public land or a contest beween adverse claimants to the same, this oath is within the purview of section 5 of the act of 1857, and perjury may be assigned on it with the same effect as if it had been taken before an officer expressly authorized by a law of the United States to administer it.

The materiality of the matter upon which the first assignment is made, and the sufficiency of the second one, remain to be considered.

The matter must be alleged to be material or it must appear to be so upon the facts stated. Where the facts are disputed, the question should be left to the jury with proper instructions from the court. But when the facts are admitted the question of materiality is one for the court. (1 Whart. Crim. L., sec. 1284; *State* v. *Bailey*, 34 Mo. 350.)

In this case the "affidavit" is alleged to have been material upon the application of the defendant to have a contest instituted to try the question whether Kinney had not forfeited his right to the land entered by him under the timber culture act, by a failure to comply with the same in the particulars therein mentioned. But it is not alleged that any particular statement in the affidavit upon which perjury is assigned was so material, but only the affidavit, as a whole. The materiality of this statement must be determined then by its relevancy to the inquiry or issue suggested or made by the affidavit.

The timber culture act requires the party making an entry of a quarter section under it, to break and plow five acres thereof the first year. If he breaks any appreciably less quantity—as only four and four fifth acres—it is not sufficient. He has failed to comply with the act and the land is open to entry by another. During the second year he must break and plow another five acres, and cultivate to crop or otherwise the five acres broken the first year. And to "cultivate to crop or otherwise" is not "to plant in timber, seeds, or cuttings," but to sow or plant in wheat, corn, clover, potatoes, or other annual crop which may be cultivated and harvested or gathered during the year. The word "otherwise," so far as it has any signification, must be construed in connection with the preceding words "to culti-

vate," so as to limit its application to some act or process which involves primarily the improvement or amelioration of the soil. And it is very plain that it does not include the planting or care of timber trees, which is placed by the act in contradistinction to the cultivation of the soil—the latter being intended, apparently, as a preparation for the former.

The question, concerning which this affidavit was filed and used, so far as this assignment of perjury is concerned, is this: Had Kinney complied with the act during the first year, after making his entry, by breaking five acres of the land during that period?

The affidavit states that Kinney did not plow five acres the first year, and adds that in fact he did not plow any portion thereof during said period. The indictment alleges that the latter statement is false because Kinney did do "some" plowing during the first year, and thereby impliedly admits that he did not plow five acres in that time.

Of course the statement that Kinney plowed no portion of the land during the first year, taken unqualifiedly, was material to the inquiry, because it is at least equivalent to saying that he did not plow five acres. But it is negatived and falsified by the indictment in a narrower sense, as that he did plow "some" portion of the land, which may be not more than a single furrow.

But the inquiry or issue was not whether Kinney had plowed "some" of the land during the first year, but whether he had plowed as much as five acres of it. The plowing of any less quantity was altogether immaterial, and the statement taken in the sense that he did not plow "some" portion of the premises was irrelevant and superfluous.

A conviction cannot be had upon an assignment of perjury unless it be on a matter material to the issue. For instance, if the question is whether certain goods have been paid for or not, and a witness testifies that they have—and on a particular day—and in fact the goods were paid for, but on another day, this is not perjury, because the day was not material but only the payment.

But when the superfluous or collateral matter is calculated

and intended to prop and bolster the testimony of the witness on some material point, as by clothing it with circumstances which add to its probability or strengthen the credibility of the witness, the case is otherwise. But when the alleged false oath only goes to a fact, the existence or non-existence of which cannot affect the question in dispute, then it is not perjury. The administration of the law is not impeded or affected by it. (1 Whart. Crim. L., secs. 1276, 1277; *Plath* v. *Braunsdorf*, 40 Wis. 111; *State* v. *Bailey*, 34 Mo. 350; *Pollard* v. *The People*, 69 Ill. 153; *The State* v. *Aiken*, 32 Iowa, 403.

As the matter on which the first assignment is made, in the sense in which it is negatived, was not directly material to the inquiry in which the affidavit was used, nor in any way calculated to strengthen or make more probable the material statement therein, that the full five acres had not been plowed, it must be held immaterial, and the indictment so far bad.

As to the second assignment, it is insufficient because it does not appear therefrom that any statement of the affidavit is false. The defendant swore that Kinney did not, during the second year, cultivate, by raising a crop or otherwise, five acres of the land—nor any other portion of it. The last part of this statement is immaterial, as nothing less than the cultivation of the full five acres is a compliance with the act.

But the indictment does not show the falsity of any part of the statement. True, it alleges generally that the statement is false, but proceeds to state wherein and why, and in so doing, impliedly admits its truth. This statement is false, says the indictment, because Kinney plowed and harrowed ten acres of the land during the second year, and near the close of it planted seven of such acres in "cuttings" four feet apart each way. But this is not the cultivation of the five acres to a crop, as required by the act, and therefore these facts do not negative or contradict the affidavit.

From this it only appears that Kinney broke ground and planted "cuttings" during the second year, and not that he cultivated five acres of the land as he was bound to do.

The demurrer is sustained.

CHARLES E. TILTON *v.* COLBURN BARRELL AND AURELIA JANE BARRELL.

CIRCUIT COURT, DISTRICT OF OREGON.
DECEMBER 27, 1882.

1. MARRIED WOMAN.—Under the act of October 21, 1880 (Ses. L., p. 6), the wife is relieved of all "civil disabilities" not imposed upon the husband; and her "rights and responsibilities" as a "parent" are "equal" to those of the latter, and therefore she is in legal contemplation as much the head of the family as he is, and he may as well be presumed to be living with her as she with him.
2. IDEM.—At common law a husband and wife might be jointly sued for a trespass which in legal contemplation might be committed by two persons: and this includes an action of ejectment which was originally only a remedy for trespass upon the rights of the termor or lessee, by depriving him of the possession during his term or time on the land.
3. IDEM.—But under the act of October 21, 1880, *supra*, the wife is as liable for the unlawful occupation of another's property as the husband is; and if they are both in the possession, they may be joined as defendants in an action to recover the same as though they were unmarried; and an allegation in the complaint that they "are husband and wife," is immaterial, and may be disregarded.

Before DEADY, District Judge.

Henry Ach, for plaintiff.

W. W. Chapman, for defendants.

DEADY, J. The plaintiff, a citizen of New York, brings this action against the defendants, citizens of Oregon, to recover the possession of a tract of land containing thirteen and one quarter acres, alleged to be worth thirteen thousand dollars, and situate in the county of Multnomah.

It is alleged in the complaint that the plaintiff is the owner in fee simple of the premises, and entitled to the possession of the same; that "the defendants are husband and wife," and are in "the wrongful and actual possession" of the premises, and "wrongfully withhold a possession thereof from the plaintiff."

The defendant, Aurelia Jane Barrell, demurs to the com-

plaint, and assigns as causes of demurrer the following: 1. "That as the wife of Colburn Barrell, she is improperly joined with him in the plaintiff's complaint;" 2. That the complaint does not state facts sufficient to constitute a cause of action, because she is sued as the wife of her co-defendant, and there are no allegations in the complaint of a cause of action, for which she, as such, is responsible or liable."

The allegation, that "the defendants are husband and wife," is an immaterial one—quite as much so as if it had been alleged they were father and daughter, brother and sister, uncle and niece, or even partners in trade.

The defendants are not sued *as* "husband and wife," but as Colburn and Aurelia Jane Barrell—two natural persons, and distinct individuals, to recover from them and each of them the possession of certain premises which plaintiff alleges that they—both of them—wrongfully withhold from him. A judgment against one of them for the possession will not authorize the removal of the other. Nor is it known, but that the defendants are in possession under a claim of right to or interest in the premises in both the husband and wife or in the latter exclusively.

Assuming, as the demurrer admits, that the complaint is true, the occupation of the premises by the wife is as much a wrong to the plaintiff, as the husband's. The removal of one of them upon the judgment and process of the court, is as necessary to the full enjoyment of his right of possession, as the other.

By the act of October 21, 1880 (Ses. L., p. 6), the wife is relieved of all "civil disabilities" not imposed upon the husband. Her "rights and responsibilities" as a "parent" are "equal" to those of the husband. In short, she is now, in legal contemplation, as much the head of the family as he is, and he may as well be presumed to be living with her as she with him. More properly speaking, they may be said to live together as equals—conforming, as far as may be, their individual wills and conduct to the requirements and exigencies of the marital relation.

But I do not understand, that even at common law, ejectment to recover the possession of premises unlawfully with-

held, did not include the case of an unlawful occupation by a married woman, or that her occupation, if conjointly with that of her husband, was therefore so merged in his, that the law could not take cognizance of it and give relief against it directly.

Mr. Chitty says (1 Chit. Pl. 105) that for "trespass, which may in legal contemplation be committed by two persons conjointly, and for which several persons may be jointly sued, the husband and wife may be sued jointly, for the act of both;" but the wife can only be sued "for her own actual wrongful trespass" and cannot become a party to a trespass "by her previous or subsequent assent" thereto during coverture.

The foundation of the action of ejectment—*ejectione firmæ*—is the trespass committed by the intruder upon the term of the termor or lessee, and originally the relief obtained by it was confined to damages for such trespass, but by the end of the fifteenth century the plaintiff in the writ was allowed to recover both his term and damages. (Adams on Eject. 7–9.)

The trespass or injury to the plaintiff's right of possession complained of in this case, so far as appears, is the act of each of the defendants, and can only be redressed by a judgment for the possession against both of them. It may be that if the husband is removed from the premises, the wife, from considerations of domestic convenience or marital obligations, will follow him. But she may not; and as has been said, she may remain in the possession, claiming the same in her own right, and may also allow her husband to return to the premises and occupy under her, and thus compel the plaintiff to relitigate his right to the possession with her in a separate and subsequent action.

But the plaintiff is entitled to bring his action against all persons in the actual possession of the premises (Or. Code Civ. Proc. 314) and recover the same, as against them all, in one action. If there is any one among them who has no claim to the possession otherwise than as a person sustaining a domestic relation to a co-defendant, he or she must decline the contest or stand or fall with such co-defendant.

The demurrer is overruled.

CHUNG YUNE *v.* JOHN KELLY.

CIRCUIT COURT, DISTRICT OF OREGON.
DECEMBER 29, 1882.

1. ACTION TO RECOVER DUTIES.—The plaintiff brought an action to recover the amount of duties paid by him on merchandise entered as sago flour, but classed and taxed by the collector as starch, against the protest of the plaintiff, that the article was sago flour and free of duty: *Held*, that the plaintiff must recover, if at all, upon the ground stated in his protest, and therefore he could not recover, although it appeared on the trial that the article was, in fact, not starch, and not dutiable.
2. FLOUR—STARCH.—A flour which is made from a farinaceous plant for food, though largely composed of starch granules, is not, therefore, the "made" or manufactured starch of commerce, upon which the statute (sec. 2504 R. S., p. 481) imposes a duty when brought from a foreign country; and it matters not that it may be in some measure used as starch.
3. EXPRESS DESIGNATION OF AN ARTICLE.—The farina of the root of the plant of the genus Manihot, whether known as root flour, cassava, or tapioca, having been expressly exempted from duty by congress (sec. 2505 R. S., pp. 488, 489), is not included in the statute, *supra*, imposing a duty on starches, although it may be largely composed of starch granules and fit for use as starch.

Before DEADY, District Judge.

Addison C. Gibbs and W. Scott Bebee, for the plaintiff.

Rufus Mallory and James F. Watson, for the defendant.

DEADY, J. This action is brought to recover from the defendant the sum of four hundred and twenty-three dollars and ninety-six cents, alleged to have been unlawfully collected by him from the plaintiff, as duties on certain merchandise entered at this port by the latter.

It is alleged in the complaint that on September 20, 1879, the plaintiff entered at the custom house, in Portland, one hundred and forty-eight boxes of merchandise, weighing eleven thousand six hundred and eighty-four pounds, of the value of three hundred and sixty-seven dollars and twenty cents, as sago flour, an article exempt from duty under the laws of the United States, upon which the defendant, as

collector of said port, imposed and collected a duty of four hundred and twenty-three dollars and ninety-six cents, which the plaintiff was thereby compelled to pay, and that the plaintiff duly appealed from the decision of the defendant, to the secretary of the treasury, who affirmed the same, whereupon the plaintiff brings this action, etc.

The defendant, by his answer, admits the allegations of the complaint but denies "that said merchandise was or is sago flour," or exempt from duty; and as a further defence, alleges that said merchandise was not "in fact sago flour," but "was starch not made from corn or potatoes, but some material to the defendant unknown, and as such starch was and is subject" to the duty collected thereon by the defendant. The case was tried with a jury and there was a verdict and judgment for the defendant. The plaintiff moved for a new trial, on the ground that the verdict was contrary to the law and the evidence.

A number of similar cases were pending against the defendant, and one—*Tond Duck Chung* v. *Kelly*—had been tried by the court with a finding for the plaintiff on April 23, 1879, and afterwards retried with a jury with a verdict for the plaintiff on January 13, 1880.

The court, not deeming the evidence produced on the trial by either party, as to the identity of the article in question, as satisfactory as it should be, for want of some known or admitted sample of sago flour with which to make a microscopic comparison of the granules of the former, postponed the consideration of the motion for a new trial until the trial of one of the other pending cases before which it was expected that the parties would procure some samples of sago from Singapore, the place where the plaintiff claims that his flour came from, as a standard of comparison. Since then the case of *Chung Yune* v. *John Kelly*, No. 613, has been tried with a jury and a verdict found for the defendant on December 8, 1882.

On the trial of this latter case, it satisfactorily appeared from the testimony of a witness sent to Singapore by the treasury department during the past summer, that sago flour is made in Singapore from the pith of the sago palm (*sagus*

Rumphii), grown there on plantations for that purpose; and that a root flour is made there from the root of a species of the genus Manihot, also grown there on plantations for that purpose.

The flour made from this root is called by the Chinese, who are principally employed in the plantations and factories, *ling fune*, root, or wood flour. It is also known in the books and in commerce as *cassava* meal, from which is made the tapioca of commerce, sometimes called Brazilian arrow root, from the fact that it is probably indigenous to Brazil, from whence it has been introduced into other parts of tropical America, Florida, Africa, and the East Indies. (Am. Cyclo., "Cassava;" Nat. Dis., Stille and Maisch, "Tapioca.")

Its early use and origin is suggested by a provision contained in an agreement made early in the sixteenth century between Andres Nino and the king of Spain, by which that royal adventurer agreed to aid the latter in an expedition to the South sea—the Pacific ocean south-west of Panama—for "gold, silver, pearls, and precious stones," by furnishing for its use, at Jamaica, among other things, "two thousand loads of *cassava root*, and five hundred hogs." (1 Ban. His. P. S., 480, note 2.) But whether the cassava was intended as food for the "people" of the expedition or the "hogs" does not distinctly appear—probably for both.

Samples of the flour or meal of the palm and the cassava, thus obtained from the plantations on the island of Singapore, were produced in court on the trial, and the article in question was subjected to a microscopic examination and comparison with these, and the evidence of the experts was unqualifiedly to the effect that, judging from the size and shape of the starch granules, the article imported by the plaintiff is not sago flour and is cassava or root flour. And upon a personal examination of the granules of the three articles with the aid of the microscope, the difference in size and shape and in the location of the hilum between those of the Singapore sago and the article in question was very marked, while the resemblance in those particulars

between the granules of the latter and the cassava was equally manifest.

In the present case, as well as that of *Chung Yune* v. *John Kelly*, No. 613, the issue to be tried arose upon the allegation of the plaintiff that the article imported was sago flour and the denial of the same by the defendant. The goods were entered by the plaintiff as sago flour, and he protested against the payment of duties upon that ground alone. His right to maintain this action at all, depends upon the statute (sec. 3011 R. S.), and he cannot recover under it unless he protested in writing against the payment of the duties, stating therein, "distinctly and specifically" the grounds of such protest. (*Nichols* v. *United States*, 7 Wall. 126; *Mason* v. *Kane*, Taney's Dec. 176; *Thomas* v. *Maxwell*, 2 Blatch. 390; *Warren* v. *Peaslee*, 2 Curt. 235.)

The burden of proof is upon the plaintiff, and before he can recover, he must prove the truth of his allegation and protest that this article is sago flour. And therefore it is, that it is of no avail to the plaintiff in this action that it now appears that this article is not dutiable and ought not to have been charged with duty, because root flour, tapioca, and cassava are all on the free list as well as sago. (R. S., pp. 488, 489.)

An issue was also made in the pleadings as to whether this article is "starch" made from some material other than potatoes, corn, or rice, and, as such, liable to pay a duty of three cents per pound and twenty per centum *ad valorem*, under schedule M, p. 481 of the revised statutes. This issue was tendered by the defendant and in the trial of it the burden of proof is upon him.

It is probably an immaterial issue, as it is not apparent how any finding upon it could control or affect the final judgment in the case. But evidence and argument were given and made to the jury upon it at the trial without objection; and in the case of *Chung Yune* v. *John Kelly*, No. 613, it being manifest that there must be a verdict for the defendant upon the ground that the merchandise was not sago flour, the court, to enable the parties to have the benefit of the trial

on this point, if the same should in any way become material hereafter, instructed the jury, if they found a verdict for the defendant, to find the answer to the following question, then submitted to them in writing (Or. Code Civ. Proc., sec. 212): "Is the article in question, and imported and entered by the defendant, a starch known to commerce as such, and made and intended to be used primarily by laundrymen in the stiffening and polishing of clothes?"—to which the jury answered "no."

This answer is undoubtedly according to the law and the fact. This "*ling fune*" or "root flour," like the flour of wheat, corn, rye, rice, and other starch-bearing plants, is largely composed of starch granules, and may be used as starch. But it is not "made" or manufactured starch or known to commerce as such.

It appears to be imported to this coast from Hongkong, by the Chinese, as an article of food, though some small proportion of the quantity imported is used as starch in the laundries, to give a degree of lustre and stiffness to the clothes which is said not to be attainable by the use of the ordinary starches.

The preparation of starch granules "made" or manufactured from the flour of farinaceous plants, for the purpose of being used in the arts as starch, sizing, or stiffening, and not food, is the starch of commerce, and the article upon which the clause in the statute imposing a duty on starch applies. It would be just as far-fetched and unreasonable to construe the statute, as authorizing a duty on wheat flour, because of its starchy nature, as on root or sago flour. Both are for the greater part composed of starch granules and may be used for starch.

But it matters not what are the component parts of the root flour or for what purpose it is used. Congress, by the act of June 6, 1872 (17 Stat. 234), has placed it, since August 1, 1872, on the free list, and exempted it from duty by name. And this is sufficient to exclude it from the operation of the general clause imposing a duty on starches. When an article is designated in an act of congress by a specific name, general terms in the same or a subsequent

act, although broad enough to comprehend it, are not considered applicable to it. A designation of an article *eo nomine* must prevail over a general description. (*Homer* v. *The Collector*, 1 Wall. 486; *Reiche* v. *Smith*, 13 Id. 162; *Movius* v. *Arthur*, 5 Otto, 144; *Arthur* v. *Lahey*, 6 Id. 112; *Arthur* v. *Rhums*, Id. 143.

The evidence introduced on the trial of this case was conflicting and unsatisfactory, because of the want of a known standard with which to compare the article. The weight of it may have been with the plaintiff, but that is not enough to justify a verdict for him. Leaving out of consideration the evidence of the defendant, the evidence of the plaintiff as to the identity of the article was open to question and doubt, and while the court might not feel authorized to set aside a verdict obtained upon it, for a stronger reason, it would feel less so, in case the verdict was against it.

But in the light of the evidence and verdict in case of Chung Yune, No. 613, it would be useless to grant a new trial in this case, as it would be followed, so far as can be seen, by another verdict for the defendant.

The motion is denied.

JOHN A. FAULL *v.* ALASKA GOLD AND SILVER MINING COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.
JANUARY 4, 1883.

1. DEBT DUE BY STOCKHOLDER TO CORPORATION.—Judgment was obtained by the plaintiff against the defendant for nineteen thousand and two dollars and five cents, and an execution thereon as against the defendant returned *nulla bona* and served on F. B. Harrington as a debtor of the defendant for one hundred and sixty-eight dollars and fifty cents, on account of unpaid calls on assessments made upon said Harrington's shares in the capital stock of the defendant, to which Harrington answered he owed the defendant nothing; but the answer not proving satisfactory to the plaintiff, he procured an order under section 309 of the code requiring the former to appear before a referee for examination; whereupon the plaintiff served on him written allegations concerning said

indebtedness as provided in section 162 of the code, to which the garnishee demurred that the court had no jurisdiction and that the garnishee is not liable in this proceeding: *Held*, 1. That the proceeding by garnishment under sections 150 and 161–9 of the code does not authorize a demurrer to the allegations of the plaintiff, but requires an answer thereto by the garnishee to which exceptions may be taken for insufficiency: 2. A due and unpaid call or assessment upon the shares of a stockholder in the capital stock of a corporation is a "debt" due such corporation within the purview of section 147 of the code, and may be collected from such stockholder by a judgment creditor of the corporation by garnishment, under sections 150 and 161–9 aforesaid.

Before DEADY, District Judge.

Rufus Mallory and James F. Watson, for the plaintiff.

James Gleason, for the garnishee.

DEADY, J. On August 11, 1882, the plaintiff, a citizen of the state of California, obtained a judgment in this court against the defendant, a corporation organized under the laws of Oregon, for nineteen thousand and two dollars and five cents, upon which, on November 20th, an execution was issued and returned, as to the defendant, "no property found," and duly served upon F. B. Harrington, as a debtor of said defendant, in the sum of one hundred and sixty-eight dollars and fifty cents, who thereupon answered that he did not owe the defendant anything.

The answer of Harrington not being satisfactory to the plaintiff, he obtained an order from this court, under section 309 of the code of civil procedure, requiring the former to appear before a referee and be examined on oath concerning said indebtedness.

Thereupon on December 15th, the plaintiff served upon said garnishee written allegations concerning the same, as provided in section 162 of said code, to which the garnishee, before the referee, demurred: 1. That the court had no jurisdiction of the garnishee or the subject; 2. That the facts stated do not show a cause of action or garnishment against the garnishee; 3. That there is a defect of parties plaintiff and defendant; and, 4. That the plaintiff has not the legal capacity to sue; whereupon the proceeding was ad-

journed into court and the questions made by the demurrer argued by counsel as upon a demurrer to a complaint.

This proceeding is taken and conducted under sections 150 and 161–169 of the Code of Civil Procedure. By these, the garnishee is required to answer the allegations under oath, or judgment may be given against him for want of an answer, as in an action. The plaintiff may except to such answer for insufficiency, or reply to it, and the issues arising between the parties shall be tried as ordinary issues of fact.

No provision is made for a demurrer to the allegations by the garnishee; and it would seem, that the only mode by which he can raise the question of the jurisdiction of the court or the legality of the proceeding is to allege such want of jurisdiction or illegality in his answer and decline to answer further on that ground. An exception to such an answer for insufficiency by the plaintiff would present the question of jurisdiction or legality as upon a demurrer to the allegations.

The pleading of the garnishee in this case is denominated a demurrer, but it may be treated as an answer denying the jurisdiction of the court and the liability of the garnishee to the defendant upon the facts stated in the allegations, to which exceptions may be filed as of the time of the argument.

In addition to the facts above stated, it also appears from the allegations of the plaintiff that the defendant has been a corporation, as aforesaid, since March 1, 1877, with its principal place of business at Portland, and having a capital stock of three hundred thousand dollars, divided into as many shares of the par value of one dollar each; that F. B. Harrington is a citizen of Oregon, and on January 1, 1879, and until June 1, 1880, was the owner of one thousand five hundred of said shares, since which he has been and still is the owner of one thousand three hundred of said shares; that between April 27 and August 9, 1880, the defendant, by its board of directors, duly levied and called for assessments upon all the unpaid stock of said corporation amounting in the aggregate to fourteen per centum thereof or one hundred and ninety dollars on the stock owned by said

Harrington, and required the same to be paid at divers dates between May 15, 1880, and June 25, 1882, inclusive, of which sum only twenty-one dollars and fifty cents has been paid by Harrington, leaving still due the defendant thereon the sum of one hundred and sixty-eight dollars and fifty cents.

The point relied on in the argument by the counsel for the garnishee is that the plaintiff's remedy is in equity, where all the creditors and stockholders may be made parties, and their rights and liabilities adjusted in one suit.

In support of this position, counsel cites and relies on *Ladd & Bush* v. *Cartwright*, 7 Or. 329. That was an action at law by certain of the creditors of a corporation against an assignor of certain shares of its stock, who had owned such stock during the existence of their debt for the unpaid balance of the same, without having attempted to collect their demand from the corporation or the assignee and then holder of the stock.

The court held that the action would not lie for the reasons: 1. No demand had been made of the defendant's assignee; 2. The remedy against the principal debtor, the corporation, had not been exhausted by judgment and execution, returned *nulla bona;* and, 3. The plaintiff's remedy was in equity where the rights of the corporation, the stockholders, and the creditors might be adjusted in one suit.

But, I do not think that case comprehends this. It certainly does not in all its circumstances, and I think it does not in principle. The case was undoubtedly well decided upon the latter two points; but in this case the plaintiff has exhausted his remedy against the corporation, and the additional circumstance upon which the plaintiff relies—the assessment of the sum demanded of the garnishee by the corporation upon his stock—did not exist in that case, and the point here made on it was not considered by the court.

By the constitution of this state (Art. XI, sec. 3), it is declared that "the stockholders of all corporations * * * shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more." Corporations may be formed under general laws

(Id., sec. 2) to engage in any lawful enterprise, business, pursuit, or occupation." (Or. Laws, p. 524.)

The liability of the individual stockholder for the indebtedness of the corporation being prescribed and limited by the constitution, the legislature may regulate the mode of enforcing it, and in the absence of such legislation, resort must be had to the general and well-established modes of procedure applicable thereto. According to the weight of authority and the argument of convenience, there is no doubt that after judgment and execution against the corporation, resort may be had to a suit in equity to ascertain the general indebtedness of the corporation and to compel a ratable contribution from the individual stockholders for the purpose of paying the same. (Thomp. on Liability of Stockholders, secs. 265, 317; *Pollard* v. *Bailey*, 20 Wall. 524.) And it may also be admitted that, unless it is otherwise provided by statute, this is the only remedy against a stockholder for the debts of the corporation. (Thomp. on Liability of Stockholders, sec. 258.)

But the proceeding by garnishment in aid of an execution at law, furnishes an additional remedy in certain cases. And in this connection, it ought not to be overlooked that such garnishment, so far as it goes, is given by the statute as a substitute for a creditor's bill. True, only the legal assets of the debtor may be reached by it, but as to these, it may be regarded as a cheap and speedy substitute for the remedy, by a creditor's bill, of which each judgment creditor may avail himself for himself, according to his diligence and opportunity.

Section 147, sub. 3, of the Oregon code provides, that property of the debtor in the possession of a third person, or a debt due him, may be attached "by leaving a certified copy of the writ and a notice specifying the property attached, with the person having the possession of the same, or if it be a *debt*, then with the debtor," * * * and by section 281 this section is made applicable to an execution.

It seems, then, that the determination of the case hinges upon the question, whether this sum of one hundred and sixty-eight dollars and fifty cents was at the time of the

service of the execution upon the garnishee, a "debt" due from him to the defendant. If it was, it is a legal asset of the defendant and may be reached by the plaintiff in this proceeding.

It does not appear that the garnishee is an original subscriber to the capital stock of the defendant, nor what was the nature and terms of such subscription, as to the time of payment. It may be said, that the garnishee took his shares of the stock, subject to the conditions as to payment, contained in the subscription made by the person to whom said shares originally issued, and that therefore the court cannot say there is any sum due from him to the defendant, thereon, until it appears by the terms of the subscription that the person to whom they were issued or his assigns, thereby agreed to pay all calls or assessments upon said shares when and as they might be made by the directors of the corporation.

It is said in Ang. & Ames on Corp. (sec. 517), that a subscription for shares in the stock of a corporation is a contract for a consideration, on which the corporation may maintain an action against the subscriber for the amount of such shares. But it must be implied in this statement that there is an express provision in the subscription to the effect that the subscriber will pay as required by the corporation, or that a subscription to the capital stock of a corporation not containing any special terms as to payment is equivalent to a promise to pay on demand.

The corporation law of this state contains no express provision declaring the effect, in this respect, of a subscription to the capital stock of a corporation; and doubtless the parties forming a corporation may insert any conditions they please on the subject in the articles of incorporation.

By subdivision 6 of section 5 of the corporation act (Or. Laws, p. 525), a corporation is authorized to make by-laws for the forced sale of its stock for unpaid assessments; and by section 14 of the same (Id. 527), it is provided, that a sale of stock transfers to the purchaser all "the rights of the original holder or person from whom the same is purchased," and subjects "such purchaser to the payment of any unpaid

balance, due or to become due on such stock;" and if the sale is voluntary, "the seller is still liable to existing creditors for the amount of such balance, unless the same is duly paid by such purchaser."

By a necessary implication, this section (14) asserts the personal liability of the subscriber for or holder of stock to pay the amount thereof according to the terms of the subscription; and if the subscription is silent on that point, then upon demand—that is, at such times and in such amounts as the corporation may from time to time direct or require.

There having been then a fixed and specific sum due from the garnishee to the defendant at the time of the service of the execution on the latter, the same was a debt or legal asset of the defendant, and liable to be levied on or attached by the plaintiff in satisfaction of his judgment against the defendant.

It is a debt absolute and not contingent, as is the remaining portion of the subscription not yet called in or ordered paid. It is therefore as much a legal asset of the corporation and as liable to be taken or attached on an execution against it as a debt due it from the garnishee for money loaned or goods sold and delivered.

The only cases in which the exact question involved in this one appears to have been considered are *Cucullu* v. *Union Ins. Co.*, 2 Rob. (La.) 571, and *Brown* v. *Same*, 3 La. Ann. 177, 183, cited in Thomp. on Liability of Stockholders, section 276. Between the two cases it was held that for any portion of an unpaid subscription for which the directors had made a formal call, a judgment creditor of the corporation might proceed against the delinquent stockholder by garnishment.

B. F. DOWELL *v.* JESSE APPLEGATE.

CIRCUIT COURT, DISTRICT OF OREGON.
JANUARY 5, 1883.

1. VOLUNTARY CONVEYANCE TO CHILDREN.—A. was a surety on the official bond of M., and being liable thereon for defalcations of his principal, but without knowledge of the same, conveyed property to his children in consideration of their having remained at home and worked for him on the farm during their nonage, and in pursuance of a promise made by him to that effect, which conveyance left him without sufficient property to meet his existing liabilities under said bond: *Held*, That the services given to the father by the children were not a valuable consideration for the promise or the conveyances, as they only did what in law they were bound to do, and therefore the conveyances were voluntary—without a valuable consideration—and invalid as against the lien of a judgment subsequently obtained against A. on account of said defalcations, either by the obligee in the bond or a co-surety who had paid the full amount thereof.
2. IDEM—GRANDCHILD.—But a conveyance to a grandchild under like circumstances upon a promise to said child, and its father, to make the same, is not voluntary, but a conveyance for a valuable consideration, and therefore valid, as against such lien.
3. ESCHEAT FUND.—The secretary of state, as such, is not authorized under the laws of Oregon, c. 16, p. 582, to collect escheat funds from the treasurer of state, and if he does so without authority from the party entitled thereto, or fails to account to him for the same, his sureties are not holden therefor.

Before SAWYER, Circuit Judge, and DEADY, District Judge.

Addison C. Gibbs and the plaintiff in person, for the plaintiff.

W. Carey Johnson, for the defendant.

SAWYER, Circuit Judge. After a careful consideration of the pleadings, evidence, and arguments of counsel in this case, I have reached the following conclusions, which I shall announce without any elaborate discussion of the evidence, or the points presented.

I am not satisfied that Jesse Applegate, or the other defendants, had any actual knowledge of any defalcations of May, prior to the appointment of the investigating commit-

tee of the legislature in 1870, or at the date of the execution of the several conveyances sought to be set aside. On the contrary, the evidence largely preponderates in favor of the opposite conclusion. I think those conveyances were made, and accepted, in good faith, and without any intent to defraud the state, or to evade the payment of any liabilities of Jesse Applegate on the official bond of May subsequently developed, and on which the judgment sought to be satisfied was afterwards recovered. There was, then, no actual fraud in making the conveyances, and they cannot be set aside on that ground.

The conveyances bearing date in April, 1867, I am satisfied were executed in that year. They bear date in April, 1867, and have certificates of acknowledgment appended thereto, which purport to have been made in May of that year, a few days after their dates; and all the direct testimony is, that they were fully executed and delivered, as early at least as the dates of acknowledgment; and that possession and control was taken in accordance with the conveyances. Conceding them to be voluntary conveyances from a father to his children for the purposes stated by them, they were made before any of the defalcations under the bond of 1866; and before any indebtedness accrued thereby to the state; and Jesse Applegate at the time owed no other debts than those arising upon the official bonds of May, 1862, and 1866, upon which judgments were subsequently recovered. The indebtedness on the bond of 1862 was comparatively small, being something over one thousand three hundred dollars. If the defalcations on this bond had already arisen, it was not known to the defendants, and there was ample property of Jesse Applegate left after these conveyances were made to satisfy this liability, as it was, in fact, afterwards satisfied out of other property of Jesse Applegate, without even resorting to any of the property subsequently conveyed to his other children by the remaining conveyances now in question.

That judgment having been fully satisfied, the liability upon which the recovery was had, arising out of defalcations under the bond of 1862, cannot affect the questions now

involved, either as to the conveyance of 1867, or those subsequently made, conceding them to be voluntary.

At the dates of the several conveyances in 1869, and subsequently, I do not think Jesse Applegate had sufficient property left after making those conveyances, to reasonably satisfy the liabilities, at that time accrued and existing on the bond of 1866, which have since passed into judgment against him, and complainant, Dowell, and been paid by Dowell. Those conveyances made by Jesse Applegate of his rights to his children, I am satisfied were voluntary conveyances. The only consideration was a promise of the father to his several children, that, if they would remain at home with him, and work on the farm till they should, respectively, become of age, or marry, he would do by them as he had done by the older brothers—convey to them a part of his lands, putting them all upon an equality, without agreeing to convey any specific tract.

This remaining with him was nothing more than they were bound to do under the law. They, therefore, neither gave, nor promised, any consideration. They remained, and the father simply fulfilled his promise, but the several conveyances can only be regarded in law, as having been made upon consideration of love and affection—a worthy, proper, and lawful thing to do, when the father is free from debt, and able to do it without injury to third parties.

But the law does not permit one to take that which really belongs, or ought to belong, to another, or is liable to satisfy another's demand, and give it to his children upon the consideration of love and affection. Some of these children, in fact, remained until after attaining their majority; but there is no independent, additional agreement shown by the evidence, by which they were bound to so remain.

There was no further contract for service, or further promise on account of their further services. I think, therefore, that these conveyances were taken subject to the rights of creditors existing at the time; and that the interest in the lands of Jesse Applegate attempted to be conveyed, is liable to be sold for the satisfaction of the judgment in favor of the state, which Dowell has paid; and that Dowell is sub-

rogated to the rights of the state as to one half of the amount of the judgment paid by him.

The conveyance to Charles Putnam, the grandson of Jesse Applegate, stands upon a different footing. He was under no obligation to serve Jesse Applegate, but he did continue in his service from fourteen till over twenty-one years of age, on a promise made to him, and to his father, some years before the execution of the official bond of May, 1866, that Applegate would convey to him a portion of land, in all respects, as he had done, and agreed to do, to his other children.

This service formed a good and valuable pecuniary consideration, and the testimony shows that it was adequate to the value of the land. I think this conveyance valid, as against the judgment now sought to be enforced.

Jesse Applegate had only a life estate in the south half of the donation claim. The deed of Mrs. Applegate to her husband in the papers is not set up in the bill or pleadings; and is not relevant to any issue made. It cannot be known what defense might have been made to it, had it been alleged and relied on. It is not admissible and cannot be considered. Mrs. Applegate's conveyances to her children are, therefore, valid as to her interest; and those interests are not liable to be applied to the satisfaction of the judgment in question.

A question arises on the record as to when the indebtedness to the state attached as against Jesse Applegate and complainant Dowell in consequence of the defalcations of May.

Was it as to each embezzlement from the moment the funds were respectively appropriated, or from a demand on the part of the state and a failure to pay over the fund? Or at the close of the term when he failed to pay over on his retiring from office? Or when the amount was judicially ascertained by the judgment in the suit of the state against May and his sureties? These questions, though important, have not been argued by counsel, and no authorities have been cited on the questions.

I do not see the bond in the record, but I suppose it con-

tains the usual conditions in official bonds. If so, there must have been a breach at every time when May unlawfully appropriated the money of the state, as to the amount so appropriated, and I am disposed to think that this is the point of time as to each sum appropriated at which the liability or indebtedness of the sureties to the state attached.

Neither the state nor the complainant, Dowell, is entitled to any account of rents and profits of the lands from the dates of the several conveyances to the present time. Dowell has nothing in the land beyond a judgment lien, and this is neither a *jus ad rem*, nor a *jus in re*, but simply a right to have his judgment satisfied out of the land. There is no trust in his favor, actual or constructive. Had the property remained in Jesse Applegate, he would have been entitled to the use of it until an actual sale, as in the case of other real property sold on execution. His grantees are in no worse condition.

The conveyances held valid, I do not think void under the evidence in the case, for want of stamps of greater value than the ones used. At all events, the complainant does not present a case of such superior equities as to entitle him to call upon a court of equity to grant him affirmative relief upon that ground.

A good deal has been said in the case about the money drawn out, ostensibly on behalf of an escheated estate, and used in the purchase of an organ for a church. That money seems to have been refunded by the church. I do not perceive that this matter in any way affects the case. I do not even see how the obtaining and use of this money by May, in the manner shown, could be an embezzlement of the funds of the estate for which his sureties are liable. I cannot find by the statute that he was in any way interested with that fund. It was to go into the treasury, and there remain until drawn out by some one authorized to draw it. It was got out by May in some way illegally, in the assumed character of agent for the parties, legally entitled to receive the fund in a proper manner. May was not treasurer and the fund was never entrusted by the state to his keeping for any purpose. He had no duties in connection with it. If,

in his assumed character of agent for the parties, he unlawfully got hold of the money, he was doubtless liable to them, and perhaps to the state; but it was not an official act for which his sureties were liable. But I do not understand that this forms any part of the judgment paid by Dowell, or that it can in any view affect the rights of the parties in this case.

Upon the views taken, there must be a decree for the complainant subjecting the life interest of Jesse Applegate in those portions of the south half of the donation claim, and the whole of the remainder of the lands described in the bill embraced in all the conveyances made in 1869, or so much thereof as may be necessary to satisfy the judgment for all moneys and interest thereon, arising from defalcations which had accrued at the date of the several conveyances respectively, and for costs.

DEADY, J. I concur in the conclusions reached by the circuit judge in the foregoing opinion and the reasons given therefor; and after hearing the counsel for the parties as directed by him, have settled the terms of the decree in the case.

Before stating them, it may be well to call attention to some of the leading facts in the case.

On September 6, 1862, Jesse Applegate and others became sureties on the official bond of Samuel E. May, secretary of state for the term of four years, and on August 4, 1866, said Applegate and B. F. Dowell became such sureties on his second official bond for a like period thereafter.

At both these dates Jesse Applegate's property consisted substantially of certain lands, situate in Douglas county, including the donation claim, No. 38, in township 22 south of range 5 west of the Wallamet meridian, which, with the exception of a tract of eight hundred and eighty acres on Mt. Yoncalla, he subsequently conveyed to his children and one grandchild in consideration of services performed by them on the farm during their nonage, and in pursuance of a promise by him to that effect, as follows: To William H. Applegate, one hundred and sixty acres of the north half of the dona-

tion claim by deed dated April 6, 1867, and eighty acres of the same by deed dated April 19, 1869; to Daniel W. Applegate, one hundred and forty-six acres in the south half of the donation claim in which he had a life estate for his own life by deed dated April 6, 1867, and eighty acres lying partly in the north and partly in the south half of the donation, but the larger part in the latter, by deed dated April 20, 1869; to Peter Applegate one hundred and seventy-five acres of the south half of said donation and forty-one and thirty-one hundredths acres in section 28 of the township aforesaid by deed of April 21, 1869; to Sallie Applegate, one hundred and sixty acres in section 23 of township 23 south of the range aforesaid, by deed of December 2, 1871, and to Charles Putnam, his grandson, two hundred and forty acres in township 22 south of the range aforesaid, by deed dated April 19, 1869.

At the date of the conveyances in 1867 May was a defaulter to the state under his first bond in the sum of one thousand three hundred and twenty-eight dollars and twenty-nine cents and under his second bond he became a defaulter in the sum of eight thousand five hundred and twenty-four dollars and twenty-five cents, of which amount five thousand five hundred and forty-six dollars was incurred before January 1, 1869. In 1874 the state obtained judgments on those bonds for these defalcations, amounting with costs and expenses to eleven thousand two hundred and fifty-eight dollars and fourteen cents.

On June 27, 1878, Dowell obtained a judgment against Jesse Applegate, in the circuit court for the county aforesaid, for the sum of four thousand eight hundred and eighty-two dollars and nineteen cents, the same being the one half of the amount theretofore paid by him to the state on the judgment obtained by it against Dowell and Applegate on account of May's defalcations under the bond of 1866, together with one hundred and forty-six dollars and sixty-nine cents, costs and disbursements, making in all the sum of five thousand and twenty-eight dollars and eighty-eight cents; and on November 16, 1878, Dowell paid the state the remaining sum due on said judgment against himself and

Applegate, to wit: one thousand three hundred and eighty-five dollars and sixty-four cents, and gave notice to the clerk of such payment and his intention to claim contribution therefor as provided in section 295 of the code of civil procedure; and, in pursuance of such notice and claim, caused an execution to issue upon said judgment against Applegate, upon which the Mt. Yoncalla tract of land was sold, and the proceeds, less the cost of sale, applied upon said claim for contribution, so that upon May 31, 1879, there was only two hundred and eighty-four dollars and sixty-one cents due him from Applegate on that account.

After making the conveyances of 1867, Jesse Applegate had still sufficient property to discharge his obligations to the state growing out of May's defalcations up to that time, but at the date of the subsequent deeds the case was otherwise. The conveyances of 1869 left him without sufficient means to pay the defalcations which had then occurred under the second bond.

The decree of the court will be, that the plaintiff has a lien upon the property of Jesse Applegate for the sum now due him on these judgments; to wit, seven thousand four hundred and eighty-eight dollars and forty-eight cents, and that the conveyances aforesaid, made since 1867, except the one to Charles Putnam, are, as against the lien of the plaintiff, invalid, and so far null and void; and that unless Jesse Applegate pay to the plaintiff the sum now due him, with his costs and expenses, within twenty days herefrom, the master of this court will proceed to sell, as upon an execution, all the interest of Jesse Applegate, on January 1, 1869, in the premises conveyed since 1867, except that portion conveyed to Charles Putnam, and after paying the expenses of the sale, to bring the remainder of the proceeds into court for distribution or application; and that the purchaser at such sale have, if necessary, due process from the court to put him in possession.

GEORGE BELL v. J. A. DONOHOE ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
JANUARY 15, 1883.

1. PARTNERS.—INDISPENSABLE PARTIES.—Where a bill in equity is filed against one of the members of a co-partnership, to set aside partnership tranactions, and vacate a conveyance of real estate, assets of the partnership, but held in the name of one of the partners for the benefit of the firm, and for an accouut, all the partners are indispensable parties to the bill.
2. INDISPENSABLE PARTIES TO STOCKHOLDERS' BILL.—A stockholder of a New York corporation filed a bill in equity on behalf of himself and such other stockholders of said corporation as should choose to come in, against a California corporation and other defendants, to set aside transactions between the said New York corporation and the other defendants; also other transactions dependent thereon, without making the corporation of which he is a stockholder a party to the bill: *Held*, That the New York corporation, of which complainant is a stockholder, is an indispensable party to the bill.
3. REQUISITES OF STOCKHOLDERS' BILL.—Bill, also, held insufficient, as not containing the allegations essential to a stockholder's bill as established in *Hawes* v. *Oakland*, 104 U. S. 450; *Huntington* v. *Palmer*, Id. 482, and *Dammeyer* v. *Coleman*, *ante*, 51.

Before SAWYER, Circuit Judge.

DEMURRER to bill in equity. This is a bill in equity, filed by complainant on his own behalf, and on behalf of all other stockholders of a New York corporation who may come in and join in the expense, against a California corporation, Donohoe, and other natural persons. The bill is very long and sets out many large and complicated transactions which took place as is alleged, under the authority and by direction of the firm of Donohoe, Kelly & Co., with the fraudulent purposes of obtaining possession of the large estates of the New York corporation. It is alleged, generally, in substance, among other things, that being stockholders of the New York corporation, Donohoe and Kelly managed to obtain control of a majority of the stock of the corporation through proxies and otherwise, elected and controlled its officers, and for fraudulent purposes organized another corporation under the laws of California,

to which by means of their control they procured a conveyance by the New York corporation of all the property; that by means of their position, they also took control and management of the California corporation, and in connection with it performed numerous other fraudulent acts alleged in the bill, by means of which the New York corporation and its stockholders were defrauded of their rights. This general statement will be sufficient to illustrate the points of the decision, without going into the particulars set out at great length in the bill. The New York corporation is not made a party to the bill, either as complainant, or defendant. The acts complained of as against Donohoe are alleged to have been performed by him in connection with Kelly, many of them, in fact, being performed by Kelly in person. But they are alleged to be partnership acts performed on partnership account, and the conveyance held by Donohoe, sought to be vacated, appears to be held for the firm. The bill prays, among other things, that the conveyance from the New York corporation to the California corporation, and various other transaction growing out of and connected with it, be set aside and declared void, and held for naught; that the conveyance to Donohoe for the firm also be annulled, and that Donohoe account for the numerous transactions complained of had by him and Kelly as partners, with the New York and the California corporations. Defendants demur to the bill.

W. C. Belcher and E. B. Mastick, for complainant.

Doyle, Barber & Scripture, for defendants.

SAWYER, Circuit Judge. After a careful consideration of this very long and elaborately drawn bill, I am satisfied that the demurrer must be sustained.

1. Kelly, in my judgment, is an indispensable party to the bill, without whose presence no decree can properly be made. He appears by the bill to be a partner with Donohoe in all the transactions of Donohoe of which complaint is made; and, it appears, that the title sought to be vacated, or controlled, is only nominally held by Donohoe for the

benefit of the firm. No decree could finally settle the rights of Donohoe and Kelly, or complainant, without the presence of Kelly. Donohoe is as much entitled to have his rights finally determined in the case, as the complainant. The case is, in my judgment, clearly, within the principle established in *Shields* v. *Barrow*, 17 How. 139; *Barney* v. *Baltimore*, 6 Wall. 280; *Burke* v. *Flood*, 6 Saw. 220; by Mr. Justice Field, in *C. S. Min. Co.* v. *V. & G. H. W. Co.*, 1 Saw. 687; and in *Ribon* v. *Railroad Co.*, 16 Wall. 450. It is difficult to perceive how partnership rights can be finally determined as to anybody without the presence of all the partners.

2. The complainant sues as a stockholder of a New York corporation, on behalf of himself and all other stockholders; but does not make the corporation itself, of which he is a stockholder, and through which his rights are derived, a party to the suit. The corporation in such cases is, certainly, an indispensable party to the suit, without the presence of which, no decree finally determining the rights of any of the parties can be made.

3. The bill does not allege many of the facts essential to give the complainant the *status* necessary to enable him to maintain the bill, as settled in *Hawes* v. *Oakland*, 104 U. S. 450; *Huntington* v. *Palmer*, Id. 482; and *Dammeyer* v. *Coleman et al.*, *ante*, 51.

As Kelly is a citizen of the same state with complainant, making him a party would, doubtless, oust the jurisdiction of the court, and it is doubtful, whether the third point can be obviated by amendment. It will, therefore, be a waste of time, at present, to examine the important, not to say difficult, questions raised upon the equities of the bill. There are exceptions to large portions of the bill for impertinence. Some of them, doubtless, are well taken. But the demurrer waives the exceptions.

The demurrer is sustained. The complainant may think the objections to the bill can be obviated, and leave will be given to amend on or before the rule day in March; if he be so advised, on failure to amend within the time given, the bill will be dismissed.

IN RE HO KING, ON HABEAS CORPUS.

DISTRICT COURT, DISTRICT OF OREGON.

JANUARY 15, 1883.

1. LABORER.—The term "laborer" is used in the treaty with China of November 17, 1880, and the act in aid thereof of May 6, 1882, in its popular sense, and does not include any person but those whose occupation involves physical toil, and who work for wages, or with a view of disposing of the product or result of their labor to others.
2. ACTOR.—A Chinese actor or theatrical performer is not a "laborer" within the purview of said treaty or law; and is, therefore, entitled to come to and reside in the United States at pleasure.
3. SECTION 6 OF THE ACT OF 1882.—The certificate provided for in section 6 of the act of May 6, 1882, is not the only competent evidence that a Chinese person is not a laborer, and, therefore, entitled to come to and reside within the United States, but the fact may be shown by any other pertinent and convincing testimony.

Before DEADY, District Judge.

William H. Adams, for the petitioner.

James F. Watson, for the respondent.

DEADY, J. This is a proceeding by *habeas corpus* to procure the deliverance of one Ho King from an alleged unlawful restraint upon his liberty.

The writ issued upon the petition of Lo Wy, a subject of the Chinese empire, residing in Portland, and upon the allegation therein that King was not permitted to bring it himself, and was directed to W. Jarvis, the master of the steamship *T. C. Hook*, under whose restraint King was alleged to be.

The respondent brings the body into court, and for return to the writ, says: that on November 25, 1882, at the port of Hongkong, Ho King took passage on the steamship *T. C. Hook*, whereof the respondent then was and now is the master, for a voyage to Honolulu *via* Victoria, B. C., and Portland, Oregon; that said vessel has proceeded on said voyage as far as this port, where it arrived on January 9, 1883, with said King on board; that said King is an actor

or theatrical performer by occupation or profession, and is not provided with a certificate from the Chinese government showing his right to land in the United States, as is required by section 6 of the act of May 6, 1882, "to execute certain treaty stipulations relating to China," and, therefore, the respondent being advised and believing that said King was not entitled to land in the United States, and that it would be unlawful to permit him to go ashore in this port, has, and does restrain him of his liberty so far as to detain him on board said steamship, and not otherwise.

To this return there is a demurrer filed.

Upon the argument of the demurrer two questions were made: 1. Is an actor a "laborer" within the meaning of that term as used in the Chinese treaty and act of May 6, 1882? and, 2. Is the certificate prescribed in section 6 of that act the only competent means of proving that a Chinese desiring to come and reside in the United States is not such a laborer?

The term "laborer" is defined by Worcester, as follows: "One who labors; one regularly employed at some hard work; a workman; an operative; often used of one who gets a livelihood at coarse manual labor as distinguished from an artisan or professional man;" and the definition given by Webster is to the same effect.

The term "laborer" is used in the supplementary treaty with China of November 17, 1880, and also in the act of May 6, 1882—by section 15, of which it is made to include "both skilled and unskilled laborers"—in its popular sense, and includes only persons who perform physical labor for wages, or with a view to make gain from the products thereof. It does not, therefore, include an actor any more than it does a merchant or teacher.

In the *Matter of Lee Yik*, lately decided by Mr. Chief Justice Greene, of Washington, and reported in the Seattle Chronicle of January 4, 1883, the learned judge, in speaking of the word "laborer," as used in this treaty and act, says: "The term has been used in common English speech time out of mind, and in the statutes of English-speaking peoples from the first statute of laborers of 23 Edward III,

till to-day, to denote a comprehensive, varied, and varying class in society, rather difficult accurately to define. There is nothing in the treaty to indicate that it is used in other than that prescriptive sense. That is the sense, therefore, that should be given it both in the treaty and in the statute. This sense is a much narrower one than etymologically belongs to the word. Etymologically, a laborer is any one who labors. He may labor physically or mentally, gratuitously or for reward, for himself or for another, freely or under control. However he labors he is in the broad sense a laborer. But that sense is never imputed in ordinary speech or writing unless there is something in the context or the circumstances to imply that it is intended. * * * A laborer, in the sense of this statute and this treaty, is one that hires himself out or is hired out to do physical toil. Physical toil is essential to the definition. So also is a contract, express or implied, to submit for wages the person who is to do the toil to him for whom it is to be done. * * * He is not a laborer, who works with his hands in his own business; but he is one who is hired out or hires himself out to that in another's business."

But I think it will be found that the term "laborer," as used in the treaty and act, must receive a somewhat broader interpretation than this. The object of both is to prevent the competition of Chinese labor with the other labor of this country. To do this, the term "laborer" must not only be taken to include such Chinese as work for wages, but also those who engage in physical toil with a view of disposing to others the products or result of such toil.

But neither the treaty nor the act have in view the protection of what are called the professional or mercantile classes or those engaged in mere mental labor from competition with the Chinese. No grievance of this kind was ever complained of, and the language of the remedy provided, plainly indicates that it was not contemplated by either of the parties to the treaty, or the congress that passed the act.

As was said by me in *Re Moncan et al.*, *ante*, 350, the concession in the supplementary treaty was only made to allow

the United States "to limit or suspend the existing right of Chinese laborers to come and be within its territory, for the purpose of laboring therein and thereby competing with the labor of its citizens for the local means of livelihood." A Chinese actor, engaged in dramatic representations upon the stage of a Chinese theater, seems as far removed from such competition as it is possible for a person to be.

It only remains to consider what effect is to be given to the fact alleged in the return that King has not the certificate prescribed in section 6 of the act of 1882.

In the case, *In re Low Yam Chow*, 7 Saw. 547, it was held by Justices Field and Hoffman, that Chinese, not laborers, who at the passage of the act did not reside in China, were not required to produce this certificate to prove they were non-laborers, prior to being allowed to land. The reasoning by which this conclusion is reached would justify the conclusion that the certificate is not absolutely necessary in any case.

The non-laborer classes of Chinese are still entitled by treaty stipulation to come to and reside in the United States and to enjoy all the "rights, privileges, immunities, and exemptions" which may be accorded to "the citizens and subjects of the most favored nation." (U. S. Pub. Treaties, 148; Treaty of November 17, 1880; Ses. Laws, 1881, 1882, p. 12.)

If section 6 of the act of 1882 is construed to absolutely require the production of the certificate therein provided for, before a Chinese who is not a laborer can come within the United States, then it will operate as a serious restriction upon the right and privilege given him by the treaty, because, in this respect, no such condition or restriction is imposed upon any subject of any other nation.

Indeed, the fact of being compelled to make proof of his condition or character at all, is a burden and inconvenience upon the Chinese coming to the United States which is not required of any other immigrant or visitor to this country. But probably, this much is unavoidable under the circumstances and must be submitted to as a necessary incident of the right of the United States under the amended treaty to

exclude from the country Chinese laborers. But the treaty (art. 1), in conceding this right, is careful to specify that: "Legislation taken in regard to Chinese laborers, will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration." It may be admitted that, taken literally, section 6 of the act of 1882 does impose this condition. But in construing a statute, it is often necessary to go deeper into the matter than the mere letter. As was said, *In re Moncan, supra*—"It is not to be presumed that congress in the passage of this act, intended to trench upon the treaty of 1868, as modified by that of 1880; and therefore it is that all general or ambiguous clauses or phrases contained in the former should be construed and applied, so as to make them conform to the latter. To the same effect is the ruling in *In re Lôw Yam Chow, supra.*

Read, then, in the light of the treaty, and considered as an aid rather than an impediment to its enforcement, this section 6 ought to be construed as a declaration on the part of the United States, that for the purpose of facilitating the entry into the country of the Chinese not within the prohibition, it will accept the certificate of the Chinese government that the bearer is not a laborer, and is *prima facie* entitled under the treaty, to come into the United States at pleasure; but that, in the absence of such certificate, a Chinese claiming the right to enter and reside in the United States, must establish the fact that he is not a laborer by evidence, as in ordinary cases of the *ex parte* proof of a fact.

But it is not to be presumed that any one will resort to this method of proof unless compelled to do so by some cogent reason or controlling emergency. For it stands to reason that it is easier for a Chinese to obtain this certificate from a friendly tribunal in his own country where the means of proof are at hand and the mode of procedure familiar to him, than to establish the facts contained in it, by original evidence in a strange country, before officers and tribunals, apt to regard him with suspicion and disfavor.

Upon this point, Chief Justice Greene has reached a similar conclusion. In the case of Lee Yip, *supra*, he says:

"Congress did not construct their law in order to annul, override, or in any degree abate aught granted in the treaty. They provided certificates for the benefit and security of the privileged classes. Non-production of a certificate is a circumstance, which if alone and unexplained may properly be regarded as proof that the person lacking it is one who is prohibited. But its non-production is open to explanation, and the presumption arising from its non-production to contradiction. Whenever the question of a right under the treaty comes before the court, evidence may be heard to establish the right."

In this case the fact that King belongs to the privileged class is established in the judgment of the court by the admission that he is an actor, of which there is not a particle of doubt.

The non-production of the certificate is also satisfactorily explained by the fact stated in the return, that he did not leave China with the intention to come to the United States but to go to Honolulu, but for some reason, having been brought here by the respondent before being taken to Honolulu, he prefers to remain here for the present at least, as he has a perfect right to, if he is one of the privileged class.

The order of the court is that Ho King is discharged from the restraint imposed by the defendant, and allowed his liberty; and that the petitioner recover costs.

CALIFORNIA ARTIFICIAL STONE PAVING COMPANY *v.* JAMES FREEBORN.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JANUARY 26, 1883.

1. ARTIFICIAL STONE PAVEMENT.—Cross-cutting the larger blocks of artificial stone pavements into smaller ones with a trowel during the process of formation, in the manner described in Molitor and Perine's cases, 7 Saw. 190, is an infringement of the Schillinger patent.
2. MARKING JOINTS NOT INFRINGEMENT.—Running the marker described in Molitor and Perine's cases along the line of the surface between the old

block and the new one formed against it, without anything being interposed, or any cutting being done between the blocks during the process of formation, is not an infringement of Schillinger's patent.

Before SAWYER, Circuit Judge.

IN this case, after a line of blocks had been formed and become solidified, a new block, from twelve to twenty feet by two or two and a half feet wide, was formed between scantlings and the block or blocks before formed, without interposing anything whatever between the new and the old blocks. The material in its plastic state having been tamped down and then a layer of finer material put on top, the whole was finished, and the blocks divided up into smaller ones during the process of formation, by use of a trowel, etc., in all respects, except as to the line between the old and new blocks, as is described in the cases of Molitor and Perine, 7 Saw. 190. Nothing was interposed and no cutting was made in the joint between the old and the new blocks. But after the material had partially set, and the block had been finished and divided into smaller blocks, the marker described in Molitor and Perine's cases was run along the line between the old and new blocks on the surface. This is the only difference in making the pavement in this case and in those of Molitor and Perine.

Wheaton & Harpham, for plaintiff.

C. H. Parker, for defendant.

SAWYER, Circuit Judge. I have gone over this subject again, as to the cross-cutting into blocks with a trowel during the process of formation. I adhere to the position that I took in the cases of Perine and Molitor. (7 Sawy. 190.) There is, in this case, a mark on the surface along the line of division between the newly formed block and the one before formed. The forming of the block against the pavement is according to the specifications in the re-issue subsequently disclaimed; but it is claimed, that, running the marker along the line between the old and new blocks on

the surface, after forming the latter, is an infringement. I am not able to take that view. I have gone as far in that direction as I think the patent will justify. I think in that particular it is not an infringement. Counsel for complainant have made a point as to simply marking lines upon the surface of the block with the marker employed. There is one case wherein it was held, that marking the surface with a fish-line, is an infringement. It is insisted by complainant, that marking off the blocks on the surface at the time of laying the pavement, with a marker about one sixteenth of an inch in depth, is an infringement. I am unable to perceive that the mere running along the surface of that blunt and rounded marker one sixteenth of an inch in depth, there being no cutting elsewhere, is making a joint. I fail to see that that is an infringement.

The complainant is entitled to a decree against the defendant for the infringement by dividing the larger block into smaller ones by cross-cutting in the manner adopted and described in the cases of Perine and Molitor (7 Saw. 190), and a decree will be entered accordingly. But I am unable to see that running the marker along the line between the old and newly formed blocks, on the surface, only, is an infringement.

WILLIAMS ET AL. *v.* THEOBALD ET AL.

DISTRICT COURT, DISTRICT OF CALIFORNIA.
JANUARY 16, 1883.

1. CHARTER-PARTY—DETENTION—LIABILITY OF CHARTERER.—Where the voyage described in the charter-party was a voyage "to San Francisco, or as near thereto as the vessel can safely get," and the cargo was to be delivered "alongside of any craft, steamer, floating depot, wharf, or pier, as may be directed by the consignees," and the consignees named a wharf to which, by reason of its crowded state, the vessel could not enter for a time greater than that within which, by other provisions in the charter-party, the discharge was to be effected after it had been commenced: *Held*, that the charterer was liable for the detention.

Before HOFFMAN, District Judge.

IN admiralty.

Millon Andros, for libellants.

Edward J. Pringle, for respondents.

The libel in this cause was promoted by Thomas Williams and others, owners of the British ship *Cambrian Princess*, against the charterers of the ship, to recover demurrage consequent on the delay, occasioned by the fault of the latter, in discharging the cargo of the vessel at San Francisco.

By the terms of the charter-party the vessel was to be laden with coals at Sydney, New South Wales, "and being so laden, shall therewith proceed to San Francisco, or so near thereto as she can safely get."

Having arrived at San Francisco, the cargo was to be delivered "alongside any craft, steamer, floating depot, wharf, or pier, * * * *as may be directed by the consignees*, to whom written notice is to be given of the vessel being ready to discharge." "The cargo is to be unloaded at the average rate of not less than one hundred tons per working day, weather permitting, but, when required by the consignees, such extra quantity is to be unloaded as may be practicable, etc., *or* charterers to pay demurrage at the rate of four-pence per registered ton *per diem*, except in case of unavoidable accident, or other hindrance beyond charterer's control." These are the only provisions of the charter-party material to this cause.

The bill of lading contained the usual conditions, and in addition thereto the provision, "*and all other conditions as per charter-party*." No consignee of the cargo was named in the bill of lading, but, by the terms thereof, the cargo was to be delivered "*to order*." Previous to the arrival of the ship at San Francisco, which was on the twenty-first day of October, 1881, the cargo had been sold to the San Francisco Gaslight Company, to which the fact of her arrival was announced on that day.

On the twenth-second of October, the day after the ar-

rival of the ship at San Francisco, the written notice required by the charter-party of the ship's readiness to deliver the cargo, was given by the master to the charterers' agent at this port. The answer admits this fact, and avers, "that immediately upon receiving notice from the master that the *Cambrian Princess* was ready to discharge cargo, the defendant directed the master to deliver the cargo in San Francisco at the wharf of the San Francisco Gaslight Company." The out-turn of the cargo was one thousand eight hundred and eight and seventeen hundred and twenty twenty-two hundred and fortieth tons, to discharge which, at one hundred tons per day, would have taken nineteen working days.

The ship was ready to discharge on the twenty-second of October, but, as that day was Saturday, the libellants exclude that day and the following Sunday—not being a working day—from the computation of the lay days, and claim only that they commenced on Monday, October 24th.

From October 24th to November 14th, inclusive of both of said days, there are twenty-two days, three of which were Sundays, leaving nineteen working days, in which the cargo could have been fully discharged.

The discharge of the cargo was commenced on the eighteenth day of November and was finished on the first day of December following, a period of seventeen days from and including the fifteenth day of November, two of which were occupied by the ship in taking "stiffening." As these two days would have been used by the ship for the same purpose had the discharge of the cargo been commenced on the twenty-fourth of October, they are excluded from the seventeen days, leaving the actual number of days that the ship was on demurrage, fifteen. For these fifteen days the libellants claim demurrage at the rate of four-pence per ton per day on the registered measurement of the ship—one thousand three hundred and fifty tons—equal to twenty-two pounds and ten shillings per day; or, reckoning the pound sterling at four dollars and eighty-six and sixty-five one hundredths cents, one hundred and nine dollars and fifty cents per day, amounting to one thousand six hundred and forty-two dollars and forty-four cents.

The charterers admitted the fact that the cargo was not discharged as soon as it could have been if the ship had gone to the wharf on the twenty-fourth of October, but they attempted to excuse this delay: (1) Because at the time the ship was ready to make delivery of the cargo "an unusual and extraordinary number of vessels had arrived at the harbor of San Francisco with cargoes of coal for the said company, and all the wharves owned or leased by said company, and all the wharves near its gas-works, were occupied, and it was impossible to receive the *Cambrian Princess* at any of said wharves until the eighteenth day of November, 1881." (2) "That the consignee was entitled, under the said charter-party, to a reasonable time to obtain a berth for said ship; that, by the custom of the port of San Francisco, five running days are allowed to the consignee for bringing ship from anchorage to dock before the days allowed by a charter-party for discharging cargo commence." (3) "That said ship was not detained by any neglect or refusal to commence receiving the cargo, as alleged in the seventh article in said libel, but by a hindrance beyond charterer's control."

It appeared from the testimony of Mr. Crockett, the superintendent of the gaslight company, that, although the coal could not have been, prior to November 18th, delivered at any wharf south of Market street, it could at any time have been delivered at the sea-wall; but, if landed there, the hauling it thence to the company's yards would have cost the company an additional fifty cents per ton.

It appeared, also, from his testimony, that the quantity of coals purchased by the gaslight company to arrive and to be delivered on its wharves in the autumn of 1881, as well as the arrival of many coal-laden vessels together, or at about the same time, and to be there unloaded, was exceptional.

HOFFMAN, J. It appears to be well settled in England that where, by the charter-party, the ship is to be brought to a particular dock, or as near thereto as she can safely get, and she is prevented from getting to her primary destination by any permanent obstacle other than an accident of navi-

gation, the ship-owner is entitled to damages for the detention by reason of the charterer's refusal to receive the cargo at the alternative place of delivery, although the obstacle which prevented her from getting into the docks (viz., their crowded state) was not an obstacle endangering her safety. (*Nelson* v. *Dahl*, 12 L. R., Ch. Div. 568; *Ford* v. *Colesworth*, L. R., 4 Q. B. 127; *Cross* v. *Beard*, 26 N. Y. 85.)

It is also settled that where the contract specifies a certain number of days for loading and unloading, and provides that for any detention beyond the lay days demurrage is to be paid at a fixed rate per day, the shipper is held very strictly to its terms; neither a municipal regulation of the port prohibiting the unloading for a limited period, nor delay occasioned by frost, tempest, or by the crowded state of the docks, will relieve him from the payment of demurrage. (*Randall* v. *Lynch*, 2 Camp. 352.) But where no particular period for loading or unloading is stipulated in the contract, the freighter is bound to receive the cargo within a reasonable time, and for the breach of his implied contract to that effect he is liable in damages. Thus, where the freighter was allowed "the usual and customary time" to unload the ship in her port of discharge, and the crowded state of the docks delayed the discharge, Lord Ellenborough held that, as *the evidence showed that it was usual and customary* in the port of London for ships laden with wines to take their berths in the dock by rotation and to discharge into bonded warehouses, there was no breach of the implied covenant to discharge in the usual and customary time. (*Rodgers* v. *Forrester*, 2 Camp. 483.)

In a subsequent case, where the charter-party was silent as to the time for unloading, it was held by Sir James Mansfield that "the law could only raise an implied promise to do what was usually stipulated for by express covenant, *viz.*, to discharge the ship in the usual and customary time for unloading such a cargo, and that had been rightly held to be the time within which a vessel can be unloaded in her turn, into the bonded warehouses." (*Burmester* v. *Hodgson*, 2 Camp. 488.)

When there is no undertaking to unload the ship within

a specified time, but it is agreed that she shall be discharged "with all possible dispatch," or "with usual dispatch," or "with the customary dispatch of the port," or "within reasonable time," the freighter is bound "to use reasonable diligence to do his part towards the *unloading according to the terms and meaning of the charter-party.*" (*Nelson* v. *Dahl*, *ubi supra*, 583.)

What is a reasonable compliance with the terms and meaning of the charter-party will depend on the circumstances of the case, and on the usages of the trade in which the vessel is engaged.

In *Rodgers* v. *Forrester* and in *Burmester* v. *Hodgson*, which seem to be the leading cases on this subject, it appeared in evidence that the usual and customary time for discharging cargoes of the kind carried in those cases, was the time within which a vessel could get a berth by rotation, and the wines could be discharged into the bonded warehouses.

In the present case no question arises, such as that presented in *Nelson* v. *Dahl*, as to whether the vessel was "an arrived vessel" before entering a particular dock designated in the charter-party. The terminus of the voyage mentioned in the charter-party is the port "of San Francisco, or as near thereto as she can safely get." She had undoubtedly arrived at San Francisco. No specified number of lay days, at the expiration of which demurrage is to run, is mentioned. The average rate at which the cargo is to be discharged is stipulated for, and the failure of the charterers to discharge at that rate renders them liable to a specified demurrage *per diem*, "except in case of unavoidable accident, or other hindrance beyond charterers' control." But this stipulation must, I think, be taken to apply merely to the rate at which the cargo shall be discharged when the discharge has been commenced. The present suit is for damages in the nature of demurrage for failure to designate a wharf where the discharge could be commenced. By the terms of the charter-party, the cargo, on arrival of the vessel at San Francisco, is to be delivered "alongside any craft, steamer, floating depot, wharf, or pier, * * * as may be directed by the consignees, to whom written notice

is to be given of the vessel being ready to discharge;" and the only question in this case is whether the consignees, for their own convenience and profit, had a right to designate a wharf at which they well knew the discharge could not be commenced until after a considerable detention of the vessel.

In the case of *Nelson* v. *Dahl*, so often cited, James, L. J., by way of illustration, supposes the case of a vessel to be discharged at a dock to be named by the charterer, and observes: "Now, could it be reasonably held that under such a charter-party as that the charterer could select and name a dock which he knew would not admit the ship for months, and so compel the ship to remain as a floating warehouse for him during those months?"

The case of *Davis* v. *Wallace*, 3 Cliff. 123, closely resembles the case at bar. The vessel was detained at the wharf designated by the charterer four days—three because the berth was occupied, and one by lack of teams. The charterer was held liable for the detention. But the charter-party in that case provided for "*quick dispatch*" at the port of delivery; and this contract, it was held, "overrides any customary mode of discharging vessels by which they are to take their turn at the wharf. The naming of a wharf is a warranty that a berth can be had there." (*Thatcher* v. *Boston Gaslight Co.*, 2 Low. 362; *Keene* v. *Audenreid*, 5 Ben. 535; *Bjorquist* v. *Steel Rails*, 3 Fed. Rep. 717.)

In *Dahl* v. *Nelson*, 6 L. R., App. Cas. 44, Lord Blackburn said: "If the charter-party had left it free for the merchant to select a dock, it may well be that he was bound to select one into which admittance could be procured. *Ogden* v. *Graham*, 1 B. & S. 773, is an authority for this position." But the case of *Ogden* v. *Graham*, to which his lordship refers, merely decides that where the vessel was to proceed to a "*safe port*" of discharge to be named by the charterer's agent, and the latter named a port closed by the order of the Chilian government, and to which the ship could not proceed without confiscation, and the ship was in consequence detained for some time at Valparaiso, after which, the port being opened, she proceeded thither, and discharged her cargo, the charterer was liable for the detention.

In *Cross* v. *Beard*, 26 N. Y. 85, it was held that in the absence of express agreement, a contract is implied that the consignee of goods will provide for discharging them within a reasonable time, to be judged of by the jury under all the circumstances; and that the refusal to admit evidence tending to show that it was in no respect his fault that there was a delay in loading or unloading the vessel, was error. But in this case there was no stipulation as to the time to be allowed for discharging the cargo, and the right of the respondent to receive it at his own wharf was conceded. It will also be noted that the court, though holding that evidence showing that the delay in providing a berth for the ship was owing to a break in the Erie canal and a storm on the lake was admissible, yet forbears to say that these facts would necessarily constitute a defense. "Whether," it says, "the defendant should be considered in fault in not providing means for unloading a greater number of vessels at one time, or whether, under the actual circumstances, he ought to have engaged another wharf to receive the coals, were questions for the jury to determine."

In *Essellyne* v. *Elmore*, 7 Biss. 69, the general principle was recognized, that in the absence of express stipulation it is the duty of the consignees to furnish, within a reasonable time after the arrival of the vessel was reported to them, a suitable place for her discharge, and also to complete it within a reasonable time; and that the fact that a considerable number of vessels, consigned to the defendants, had arrived with cargoes about the same time, and there was delay in consequence in assigning her a berth, was a circumstance for which the ship-owner was not responsible. "It was a risk which the defendants themselves took when they agreed to freight the schooner."

It is, perhaps, not easy to reconcile these cases, but it is to be observed: 1. That the New York case does not decide that the defendant's inability to furnish a berth, by reason of the crowded state of the docks in consequence of a storm, is an absolute excuse for the detention, but only that evidence of that fact may be given to the jury, leaving them to judge whether, under all the circumstances, he ought not to

have provided additional means or furnish another wharf; 2. That the authorities chiefly relied on are the cases of *Rodgers* v. *Forrester* and *Burmester* v. *Hodgson*, already cited in this opinion, within the reasons of which the case under consideration by the court was supposed to fall. But we have seen that in each of those cases it was proved that the customary time for discharge in the port of London, of the cargoes in question, was the time within which the vessel "could obtain a berth by rotation, and the cargo be discharged into bonded warehouses." No such proof was offered in that case or in the case at bar, and if it had been in the latter, it would perhaps not have materially altered the case.

If, then, the implied stipulation, where no specific time for discharge is mentioned, is that it shall be effected within a reasonable time, it appears to me that the case in Bissell lays down the more reasonable doctrine, and that the consequences of the inability of the consignee to furnish a place where the discharge can be effected within such reasonable time, ought not to fall upon the vessel.

Although the charter-party in the present case does not specify a certain number of lay days, at the expiration of which demurrage is to run, it indicates the rate at which the discharge, when commenced, shall be effected. The cargo is to be unloaded at the average rate of not less than one hundred tons per day, weather permitting, or charterers to pay demurrage at the rate of four-pence per "registered ton *per diem*, except in case of unavoidable accident or other hindrance beyond charterer's control." As the discharge, when commenced, was not interrupted by any accident or hindrance whatever, but was conducted with dispatch, this clause may be left out of consideration. (*Thatcher* v. *Boston Gaslight Co.*, 2 Low. 363.)

The cargo actually delivered at San Francisco was one thousand eight hundred and eight tons. Dividing this by one hundred, the least number of tons to be received daily, and we have nineteen working days for the period within which the cargo was to be discharged; and this period is fixed with as much certainty as though nineteen working

days had been originally written in the charter-party as the number of lay days. (*Sanguenette* v. *P. S. Nav. Co.*, 2 L. R., Q. B. Div. 238.)

The vessel was reported ready to discharge on the twenty-second of October. It is only claimed, however, that the lay days began to run on the twenty-fourth. The discharge was not commenced until November 18th, and was finished on December 1st. Excluding the Sundays which intervened between October 24th and November 18th, the vessel was thus detained for a period greater by several days than the whole time allowed by the charter-party for her discharge.

It has already been observed that there is no evidence to show that by the customs of the port or the usages of this particular trade vessels are required to await their turn to unload at the dock which may be specified in the charter-party or designated by the consignee, so as to bring this case within the reasons of the *nisi prius* cases reported in 2 Campbell. If such usage had been shown, and a particular dock had been mentioned in the charter-party, a reasonable detention while awaiting a berth might be deemed within the contemplation of both parties, but not even then, as we have seen, any permanent or protracted detention. (*Nelson* v. *Dahl, ubi supra.*) But in this charter not only is no particular dock mentioned, but the vessel is required to discharge "alongside any craft, steamer, floating depot, wharf, or pier, as may be directed by the consignees." It may be doubted whether it was contemplated by either of the parties that a dock might be selected by the consignees, into which, by the usage of the port (if such usage had been shown), vessels could only enter in their turn. If a usage had in fact existed requiring Australian coal vessels to discharge in their turn at particular wharves, the parties do not seem to have contracted with reference to it, for the charterer reserved the right to designate "any craft, steamer, floating depot, wharf, or pier," he might select. Some reliance is placed on a regulation of the Merchants' Exchange of San Francisco, to the effect that for vessels with coal from the Atlantic or Australian ports the lay days shall commence five running days after arrival, providing that discharging

berth can be procured. But there is no proof that this regulation was known to the parties, or that they acted with reference to it, or that it is or has been acted on by any one. Its mere existence, perhaps as a dead letter, is clearly insufficient to prove a usage in conformity to it. (10 Barn. & Cress. 770.) Even if it were allowed, as fixing the time when the lay days began, viz., five days after the vessel's arrival, it would only make a difference of three days. The vessel arrived October 21st. The libellants only claim that the lay days began to run on the twenty-fourth. If, by a well-established and generally recognized custom of the port, the charterers in this trade were allowed a certain number of days to find a berth for the vessel (*e. g.*, three days, as in New York), the lay days would be reckoned (in the absence of a special contract) from their expiration. But no such usage is shown, and the detention was not caused by the consignee's inability to procure a berth, but by his selection of a dock where he well knew that no berth could be obtained.

It seems to me that the fair and reasonable interpretation of the contract is that the charterer was, unless in case of unavoidable accident or other hindrance beyond his control, to receive the cargo at the rate per working day mentioned, and therefore within the time thereby indicated, and that he had no more right to select a wharf at which the discharge could not be commenced until the twenty-seventh day after the vessel's arrival, than he had to designate a "craft, steamer, or floating depot" which would not be ready to receive the cargo until after a similar delay, or which had not the capacity to take on board the number of tons per day agreed to be received; and for the detention caused by this selection he is liable.

We have already seen if the charter-party had contained a provision for "quick dispatch," "the utmost possible dispatch," or the like, any custom of the port by which vessels in the trade are required to discharge at particular docks, and to await their turn for a berth, would be overridden by the express agreement of the parties.

In the entire absence of proof of any such custom, and in

presence of the stipulation fixing the rate at which the discharge should be effected, I think that, even under a provision for "customary dispatch," the delay in commencing the discharge in this case would, in view of its duration and its causes, have been wholly unjustifiable. The libellants claim that the vessel was detained fifteen days. I think she was in fact detained for at least that number of days. The demurrage agreed upon for the detention of the ship by reason of the charterer's failure to discharge at the rate *per diem* specified in the charter-party would seem to afford a *prima facie* rule of damages for delay in commencing the discharge.

It is suggested that this is not in fact an accurate measure of the damages actually sustained. A reference will therefore be had to the commissioner to take testimony and report the actual damages sustained by the fifteen days' detention.

NEVADA BANK OF SAN FRANCISCO *v.* AARON D. TREADWAY AND MARY E. TREADWAY, HIS WIFE.

CIRCUIT COURT, DISTRICT OF NEVADA.
JANUARY 23, 1883.

1. HOMESTEAD ACT OF NEVADA CONSTRUED.—A party clai.ning the benefit of the homestead act, must record his written claim, or declaration of homestead, in the manner in the act prescribed.
2. WHEN DECLARATION TAKES EFFECT.—When such declaration is duly made and recorded, the property, from that instant, becomes exempt from forced sale, except for the debts and liabilities mentioned in the constitution and statute of the state.
3. SAME.—Where declaration of homestead was duly made and recorded *five* days prior to advertised sale of premises: *Held*, that such declaration was made and recorded within time; that the premises could not be legally sold, and that a forced sale thereof was void, the debt upon which the homestead was sold not being one of the class of debts enumerated and excepted in the constitution of the state.
4. DEDICATION—WHEN RIGHTS ATTACH.—Homestead rights attach whenever the property is dedicated to such use, in the manner by law provided, and if such dedication is made at any time before forced sale, the property becomes exempt, and can not be legally sold.

Before SABIN, District Judge.

ACTION, ejectment. The facts appear in the opinion.

B. C. Whitman, for plaintiff.

Ellis & Judge and William Woodburn, for defendants.

SABIN, J. This is an action of ejectment, brought by the plaintiff, a corporation, organized in the state of California, against the defendants, residents of Ormsby county, Nevada, to recover possession of certain lands situated in said Ormsby county, and described in the complaint filed herein.

The action was tried before the court, a jury having been waived. The complaint alleges that on the twenty-eighth day of July, A. D. 1880, plaintiff commenced an action in the district court of the second judicial district of the state of Nevada, in and for said Ormsby county, against the defendant, Aaron D. Treadway, to recover the sum of nine thousand eight hundred and sixteen dollars and fifty cents, with interest thereon at the rate of one and a half per cent. until paid. That a writ of attachment was duly issued out of said court in said action, at the commencement thereof, which was duly levied upon certain real estate of said defendant, A. D. Treadway, and being the property in controversy in this action. That thereafter, on the thirteenth of June, 1881, plaintiff duly recovered judgment in said action against said defendant, A. D. Treadway, for the sum of ten thousand one hundred and eighty-four dollars and sixty cents damages, and one hundred and eight dollars and thirty-five cents costs. That on the ninth of July, 1881, execution was duly issued out of said court upon said judgment, which was duly levied upon the lands and premises attached, and now the subject of this action. That on the fifth day of August, A. D. 1881, after due and legal notice of the sale thereof, said lands and premises were struck off and sold to plaintiff by the sheriff of said county, for the sum of four thousand and five hundred dollars, and certificate of sale thereof duly issued to plaintiff. That thereafter, on the

eleventh day of February, 1882, more than six months from the date of sale (six months being the time allowed by Nevada statute from date of sale for redemption) having elapsed, plaintiff received a sheriff's deed of said lands and premises, which was duly recorded in said county.

Plaintiff alleges ownership and right of possession under said deed. Plaintiff further alleges that, at the date of the levy of the writ of attachment, and at the date of the levy of the execution upon said lands, the defendant, A. D. Treadway, was an unmarried man, "not having the care and maintenance of minor brothers or sisters, or either, nor of a brother's or sister's minor children, or any such, nor of a father or mother, or either, nor of grandparent, or parents, nor unmarried sister or sisters living in the house with him." Plaintiff further alleges that, on the first day of August, 1881, the defendants intermarried; that on the fifth (first?) day of August, 1881, they filed a declaration of homestead on the premises, and that since that date they have, and now claim, said premises as a homestead, and withhold the same from plaintiff. Plaintiff demands restitution of the premises and five hundred dollars damages and costs of suit.

Defendants plead a technical denial of the levy of the writ of attachment, before mentioned; the recovery of judgment, levy of execution, and sale thereunder. They deny the ownership by plaintiff of said premises. They plead affirmatively that, since, and including the first day of August, A. D. 1881, they have been, and now are, husband and wife; that since said date they have actually and continuously resided upon said premises as a homestead, and have used and claimed the same as such; that they, or either of them, have not, for more than twenty years last past, had or claimed any other homestead; that the defendant, A. D. Treadway, has resided upon said premises continuously since the year A. D. 1860, and that he has had residing with him thereon, the minor children and grandchildren of his brother. That, on the first day of August, 1881, they duly executed and caused to be recorded, on that day, in the proper office of said county, their declaration claiming said

premises as a homestead; that they now claim said premises as a homestead, and that the alleged sale thereof, by the sheriff of Ormsby county, on the fifth day of August, 1881, was and is void.

The plaintiff offered and read in evidence the judgment roll and record, in the suit of plaintiff against the defendant A. D. Treadway, commenced July 28, 1880, the writ of attachment issued therein, and the sheriff's return thereon, showing levy of the same upon the premises in question; the judgment, execution, and return thereon showing the sale of the premises August 5, 1881, by the sheriff to plaintiff, and the sheriff's deed therefor, dated February 11, A. D. 1882, duly recorded. Also the record evidence of the lawful marriage of defendants at said Ormsby county, on the first day of August, A. D. 1881.

Defendants offered in evidence a declaration of their claim of homestead of said premises, dated and duly executed August 1, 1881, and duly recorded in the proper office in said county on that day. Defendant A. D. Treadway testified that defendants were lawfully married on the first day of August, 1881, and are now husband and wife; that since said date they have actually and continuously resided upon said premises as a homestead; that they had and claimed no other homestead; that he had resided on said premises for the past twenty years or more; that until August 1, 1881, he was an unmarried man; that for a portion of the time during which he had resided on said premises he had residing with him minor children and grandchildren of a brother, whom he supported and maintained. The above is the substance of the evidence offered by both parties.

The declaration of homestead, offered and read in evidence by defendants, was, in form and substance, a full compliance with the statute of the state relative thereto. Under the facts, established by the pleadings and evidence, the question decisive of this case is this: Were the premises in controversy subject to forced sale on the fifth day of August, 1881, upon the judgment of plaintiff, recovered June 13, 1881, against the defendant A. D. Treadway?

Section 14, article I, of the constitution of the state of Nevada, declares: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted." Section 30, article IV, of the same constitution, further provides: "A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon; provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife; and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

This constitution was adopted in 1864, and has not been amended in these particulars.

We need not discuss the justice or expediency of exemption laws, since it is purely a matter of domestic policy of each state, both as to whether there shall be any exemption of real or personal property, or both, from forced sale, and the extent of such exemption. In nearly, if not quite all of the states and territories laws of this character prevail, but differing widely as to the extent of the exemption and the manner of the debtor's availing himself thereof. Enacted in the spirit of humanity and beneficence, they have received almost universal approval, and are to be fairly and liberally interpreted to secure the object sought.

The first legislature of the state, which convened after the adoption of the constitution, passed an act, approved March 6, 1865, giving effect to these provisions of the constitution. (Comp. L. Nev. 60.) This act provided for the selection and exemption of a homestead, not exceeding in value five thousand dollars.

In 1879 the legislature amended this act, and provided as follows: "The homestead, consisting of a quantity of land,

together with the dwelling-house thereon and its appurtenances, not exceeding in value five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after November 13th, in the year of our Lord 1861, except process to enforce the payment of purchase money for such premises, or for improvements thereon, or for legal taxes imposed thereon, or for the payment of any mortgage thereon executed and given by both husband and wife, when that relation exists.

"Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention in writing to claim the same as a homestead. Said declaration shall state, when made by a married person or persons, that they, or either of them, are married, or if not married, that he or she is the head of a family, and they, or either of them, as the case may be, are, at the time of making such declaration, residing with their family, or with the person or persons under their care and maintenance, on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead, which declaration shall be signed by the party or parties making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants."

There are several other provisions in the act, which need not be given here, as they do not affect the case at bar. The portion of the act, as above quoted, is the law now in force in this state, so far as is pertinent to this case. It will be observed that the statute is silent as to the time when a declaration of homestead must be executed and recorded, in the proper county, to bring the homestead within the protection of the statute. It is a familiar principle, governing the federal courts, that in giving effect to, or in construing the constitution or laws of a state, involving only a question of the domestic policy of that state,

they will look to the decisions of the court of last resort of such state for a correct interpretation thereof, and will be guided and controlled thereby. Were we, then, in doubt, under section 30, article IV, of the constitution of Nevada, and under the statute, as above quoted, as to the time when the declaration of homestead must be executed and recorded, to protect the homestead from forced sale, we should look for the rule relative thereto in the decisions of the supreme court of this state, and if such rule has been established by that court, this court would be controlled thereby in giving effect to the homestead law. It is believed that this rule has been established by that court, clearly and fully. It should be remembered that the homestead act of 1865, was silent as to the time when declaration of homestead should be filed and recorded. In this respect the act of 1865, and that of 1879, are similar, and they are also similar as to the mode of selecting and recording a homestead claim. In *Hawthorne and Wife* v. *Smith*, 3 Nev. 182, the court had occasion to discuss this question of liens upon homesteads, under the act of 1865, which act, in this respect, differs in no wise from the act of 1879.

The facts of the case, as stated by the court, were: "In the month of March, 1866, appellants (Hawthorne and wife) moved into a house which, with the land attached thereto, is now the subject of litigation. In September of the same year one Robert Woodburn brought suit against W. A. Hawthorne (one of the appellants), and, at the time of bringing suit, sued out a writ of attachment, and had it levied on this house and grounds. In December of the same year, judgment was rendered in favor of plaintiff, and in the early part of the year 1867, execution was issued, and the property previously levied on, under the attachment, was advertised for sale. In October, 1866 (after the attachment levied, but before judgment), the appellants filed a declaration of homestead on the property now in dispute. When the sheriff advertised the property for sale the appellants filed their bill, praying an injunction to restrain the sale, and claiming that the property was exempt under the constitution and homestead act. The district judge issued

a temporary restraining order, and required the defendant, Smith, who is sheriff of Ormsby county, to show cause at a certain day why a perpetual injunction should not be granted. At the hearing of this rule the judge refused to grant an injunction, and discharged the restraining order. From this ruling in regard to an injunction the plaintiffs appeal."

The supreme court reversed this ruling of the district judge, and directed the lower court to issue an injunction, pending the action, and to "take such further steps as the equity of the case may require."

The court says: "It is evident the constitution intended that, at all times, the homestead of a family should be exempt from forced sale, except in a few enumerated cases. It is equally evident the legislature intended to carry out this policy of exempting the homestead. If, then, it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, certainly we should not hold that a creditor can defeat that policy by any act of his, unless the statute clearly gives that right, or clearly points out the contingency, upon the happening of which the debtor should lose the benefit of the exemption. Here the property was clearly a homestead in fact. If it lacked anything of being such a homestead as the law exempts, it was only the execution and filing for record of a declaration by the husband and wife, or either of them, that they had selected it as such. Upon the filing of such declaration, the statute says it shall be exempt. It is hardly claimed by respondent that the existence of debts, or the actual insolvency of appellants at the time of filing, would have affected their right to select the homestead and claim the exemption. If, then, the prior insolvency of a party will not prevent his claiming the exemption, we see no reason why an attachment should. The law declares property thus selected shall be exempt from execution. It makes no exceptions. It is no greater hardship to exempt it from an attaching creditor than any other creditor. The object of the attachment law is not to allow the creditor to seize property which is ex-

empt from execution, but to secure that which is liable to such process.

"As the law is totally silent as to the time when a selection shall be made of the homestead, declares no penalty for failing to select, makes no reservation in favor of liens acquired before selection, but simply says that when selected it shall be exempt from forced sale, we are forced to the conclusion that, after the selection is made and filed for record, no levy upon, or sale of the homestead property, can be legally made, except for those classes of debts mentioned in the constitution."

This decision was rendered in 1867. Twelve years thereafter, during which time this decision had stood unquestioned, and had virtually become a rule of property throughout the state, the legislature passed the act of 1879, amending the act of 1865, in some particulars, but not in respect to the time when selection of homestead must be made and recorded. The law was left as it had stood before, and as it had been expounded by the supreme court.

The legislature, in 1879, virtually gave its sanction to the ruling of the court, made in 1867, upon this point, from the fact that it made no change therein. It is probable that this non-action of the legislature on this point was something more than accidental. The exemption of the homestead from forced sale—a refuge for the family in time of financial distress—is a matter near to almost every family in the state, and we are not at liberty to suppose that the legislature, in 1879, in amending in some particulars the act of 1865, was careless, indifferent, or ignorant upon this vital point, as to when the declaration of homestead must be filed and recorded, or that it intentionally left so important a matter in doubt. On the contrary, we are compelled to believe that the legislature knew the construction which had been placed upon the constitution and the act of 1865, in this respect, by the supreme court, and which for twelve years had been the settled law of the state; that it was satisfied therewith, and did not wish to, and would not, make any changes therein in this respect. And this is a well-established rule of construction in like cases with the present. In 1880 the

supreme court reaffirmed the doctrine established in *Hawthorne* v. *Smith*, quoting, in terms, the latter portion of the opinion in that case, as above given. (*Lachman* v. *Smith*, 15 Nev. 425.)

The court further decided in this case that a party must file for record his written claim or declaration of homestead, as prescribed in the act of 1879, in order to avail himself of the benefits of the act.

In *Estate of David Walley*, 11 Nev. 264, in discussing the probate and homestead acts, the court says: "Each is intended to exempt the homestead from certain liabilities; but the one, the homestead act, exempts it from liability for the debts of the owner, so long, at least, as he continues to be the head of the family, no matter at what time after November 13, 1861, the debts may have been contracted, whether before or after the family relation commenced, or before or after the homestead was dedicated."

These decisions of the supreme court of the state seem decisive of this case, and are binding upon this court. In them it is distinctly held, that "after the selection (of homestead) is made and filed for record, no levy upon, or sale of the homestead property, can be legally made, except for those classes of debts mentioned in the constitution;" and that the homestead is exempt from liability for debts of the owner, "so long, at least, as he continues to be the head of a family, no matter at what time, after November 13, 1861, the debts may have been contracted—whether before or after the family relation commenced, or before or after the homestead was dedicated."

In the case at bar, it is not claimed that the original liability, or debt, upon which plaintiff recovered judgment against the defendant, A. D. Treadway, June 13, 1881, and upon which this property was sold, comes within any of the classes of debts or liabilities excepted and mentioned in the constitution, and for which a homestead may be sold. Neither is it claimed that this property exceeds five thousand dollars in value; nor that the declaration of homestead filed for record by defendants, August 1, 1881, was not a full compliance with the statute relative thereto; nor that defendants were not at that time, and now, lawful husband

and wife, and living upon said premises as their homestead. From the instant the declaration of homestead was filed for record the property in controversy became and was a "homestead, as provided by law," and from that instant it came within the protection of the constitution and the statute, and could not be levied upon, or sold for, or upon, any debt or liability not excepted and mentioned in the constitution.

It was clearly the intention of the constitution to protect the homestead from forced sale, except for the class of debts mentioned, and the legislature was charged with the duty of giving effect to the provision of the constitution—which it did in the passage of the act of 1865, and the subsequent act of 1879. It prescribed the value of the homestead, and the manner in which it should be selected. And when so selected the homestead rights attached, and it became exempt from forced sale. The constitution nowhere subjects the homestead to sale for debts which the owner may have incurred prior to his marriage—or to liens which may have accrued against it prior to its dedication as a homestead. Can we possibly suppose, or presume, that the constitutional convention which framed section 30 of article IV, when excepting certain debts and liabilities for which the homestead might be sold, intended also to include other liabilities not enumerated, and which should be left to the shifting decisions of courts to enforce? Or can we presume that the legislatures of 1865 and 1879 so intended in the passage of the homestead act and the amendments thereto?

The constitution and the statutes both clearly define the debts and liabilities for which the homestead may be subject and liable, and this limitation of liability is the exclusion of all others. We are not at liberty to add to or take aught from the constitution or statute not necessary to a clear understanding thereof.

It is urged by plaintiff:

1. That defendants were not in a condition to avail themselves of the benefits of the homestead act prior to the time when the lien of plaintiffs' judgment against the defendant, A. D. Treadway, attached upon the premises, from the fact that defendants were not married until August 1, 1881, while said judgment was rendered June 13, 1881, and:

2. That the lien of that judgment is prior and superior to any homestead rights which defendants may, or could, have acquired subsequent thereto. The first point is distinctly ruled upon by the supreme court of Texas, in the case of *North* v. *Shearn and Wife*, 15 Tex. 174, and is decided adversely to plaintiff's position in this case.

The same court has also ruled upon the second point, in the case of *Stone* v. *Darwell*, 20 Tex. 14. In this case the court says: "The right of the homestead is placed by the constitution above any claims or liens for the satisfaction of debts. If this were not the rule, no debtor could ever procure a homestead until he discharged all previous judgments, for they are liens upon his lands; or until he had paid all judgments rendered since his purchase of lands, but before he was able to erect a dwelling-house on the portion selected by him for his homestead."

The constitution of Texas is very similar to that of Nevada, in reference to homestead exemption, and the decisions of the supreme court of that state are applicable in Nevada. (In addition to the cases above cited, see also, *Macmanus* v. *Campbell*, 37 Tex. 267.)

It is true that, in some of the states, it is held that a lien of attachment, or judgment, if acquired prior to the selection or recording of the claim of homestead, takes precedence of the homestead claim, thus virtually defeating the very object of the act. (Thompson on Homesteads and Exemptions, sec. 317 *et seq.*)

It is believed, however, that this is not the general rule. (Smyth on Homesteads and Exemptions, secs. 176–180, and cases there cited; 16 Cal. 214; 25 Ill. 221; 43 Id. 297; 53 Id. 377.)

Resting the case at bar upon the constitution and statute of Nevada, and upon what clearly seems to be the weight of authority of the adjudicated cases, upon the points in issue in this case, the court is compelled to hold that the sale of the premises in controversy by the sheriff, on the fifth of August, 1881, was, and is, wholly void, and plaintiff took nothing thereby.

Let judgment be entered for defendants.

JOSHUA HENDY *v.* GOLDEN STATE AND MINERS IRON WORKS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
JANUARY 29, 1883.

1. RE-ISSUED PATENT.—The specifications for the re-issue of a patent may be amended by the model deposited in the patent office, as well as by the drawings.
2. SPECIFICATIONS AMENDED BY MODEL.—Where the original specifications and drawings do not show whether, or not, the machine patented embraced a feature claimed in the re-issued patent, the court cannot say from a comparison of the original and re-issued patents, alone, whether the re-issue embraces a feature not indicated in the machine as first patented, without an inspection of the original model deposited in the patent office.

Before SAWYER, Circuit Judge.

Boone & Miller, for complainant.

M. A. Wheaton, for defendant.

SAWYER, Circuit Judge, delivering an oral decision. This is a demurrer to a bill in equity for the infringement of a patent for an ore crushing machine. The original patent and the re-issue are both set out; and the point is, that the re-issue is broader than the original patent, and takes in an element not indicated in the original specifications and drawings. This new feature of the patent is, the extension of the rear board of the hopper downwards, so as to operate as a scraper on a vibrating tray, for the purpose of forcing the ore to pass off. There is nothing stated in the specifications of the original patent in regard to this construction of the hopper board at the rear; and it does not appear, whether it was so formed, by the drawings in the original patent. Nor does it appear that it was not there. It may have been, and probably was, in the original machine and model. In the drawings of the re-issue, there is a part of the side cut away on the hopper, to show the extension of this rear board downwards to the vibrating tray. In the first drawings, the side is not cut

away, and it does not show, whether the rear board goes down to the tray, or not. In all other respects, the drawings are the same in the two patents. The law authorizes the change of the specification—authorizes the specifications, for the purpose of the re-issue, to be amended *by the model* in a machine patent *as well as by the drawings;* and the supreme court in *Seymour* v. *Osborn* recognizes the right to amend the specifications by the model in such patents, as well as by the drawings. I think, therefore, from the comparison of the original patent with the re-issue, without the model, that I cannot assume that the specifications have been enlarged, so as to embrace matters not indicated in the original model. The original patent does not show that this rear hopper board did *not* extend down so as to act as a scraper; and the model filed, as required by the patent law, may, and probably does, show, that it is so extended. As the specifications may have been amended by the model from a mere comparison of the original patent with the re-issue, it cannot be seen that the amendments in the specifications have not been properly made from the model; or that the invention is not therein clearly indicated; consequently, I cannot say, without seeing the model deposited, that the re-issue embraces more than the original invention. It does not appear affirmatively that it does, and the presumption is that the commissioner did not exceed his jurisdiction in granting the re-issue.

The demurrer is overruled.

LOUIS SLESSINGER *v.* T. H. BUCKINGHAM ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
JANUARY 29, 1883.

1. PROOF OF INFRINGEMENT BEFORE BILL FILED.—An infringement must be shown to have taken place either by making, selling, or using the article patented, before the filing of the bill, or there can be no recovery.
2. ANSWER TO BILL UNDER OATH.—Where the complainant does not waive an answer to the bill under oath, the answer, distinctly denying the ma-

terial matters alleged, not only makes an issue, but proves it; so that it will require the evidence of two witnesses, or of one witness, and other circumstances equivalent to a second, to overthrow the answer.

3. WAIVING ANSWER UNDER OATH.—The great advantage to complainant in many cases under the present rules relating to the competency of witnesses of waiving an answer under oath, pointed out.

Before SAWYER, Circuit Judge.

John L. Boone, for complainant.

M. A. Wheaton, for defendants.

SAWYER, Circuit Judge, delivering an oral decision. In this case I am compelled to decide, that the evidence is insufficient to show an infringement before the filing of this bill; or, indeed, an infringement at any time. The evidence is very slight upon those points. There are two points made by defendants, both of which, I think, are well taken. One is, that, if it is conceded, that the articles charged to have been made are an infringement of the patent, it does not appear that those articles were sold or made prior to the filing of the bill. The defendants make that point, and rely upon it. The only testimony, is, taking it in its aspect most favorable to complainant, that there was a pair of boots purchased from the defendants, some time before the taking of the witness' testimony, and that it was somewhere within the last two or three months before that date. The testimony was taken about three months after the filing of the bill. There is nothing to show that the purchase was before the filing of the bill. It may have been, so far as anything to the contrary appears, a month, or two months after the filing of the bill; and the affirmative of the issue is upon the complainant.

There is, then, no testimony, even if we concede that those boots were made and sold by the firm—no evidence to show that they were sold, or made, before the filing of the bill.

The answer denies, categorically, and distinctly, that the defendants have infringed the patent, or made the boots, as alleged to have been made in the bill, or otherwise. We

have, then, the testimony of one witness, only, against that of another, and the testimony of that one witness does not show that the pair of boots was sold, or even made, before the filing of the bill. Again, there is no *positive* testimony that these boots were made, or sold, by the defendants at all. The one witness on the point testifies, that he sold the boots to the complainant in this case, and *he thinks* it is a pair of boots, that his own firm purchased of the defendants. He does not know it, but *thinks* so. That is all there is of that.

The other circumstance relied on is, that there is a mark on the boots, which purports to be the mark of the defendant; but there is no testimony that it is the mark of the defendant, or, when or by whom it was put on the boots. Defendants are required to answer under oath, or what is the same thing in substance, an answer under oath is not waived in the bill, and they deny, under oath, categorically, and directly, that they made the boots alleged in the bill to have been made, "prior to the filing of the bill, *or otherwise.*"

They deny the infringement alleged, and it requires positive testimony to overthrow that answer. The answer, so far as responsive to the bill, directly denying the matters alleged, not only makes an issue, but it is testimony in the case called for by complainant, proving the issue for defendants; and it must be overthrown by the testimony of two witnesses, or the testimony of one witness, and circumstances equivalent to another, or, at least, sufficient to make a preponderance of testimony in favor of complainant. Solicitors, generally, in this circuit, seem to overlook the great disadvantages under which they often labor, in not waiving an answer under oath in equity cases, now that the complainant and defendant are themselves both competent witnesses, and can be *orally* examined under Equity Rule 67, where the complainant can get the evidence of his opponent, fresh from him in person, under a sharp and pressing examination, instead of having it deliberately shaped by, and cautiously arranged and shaded for him, by his solicitor, at his leisure, in his office. Besides, when examined, orally,

as a witness, the defendant counts *but one;* and the complainant may offer himself in opposition as to matters within his knowledge, if he swerves in the least particular from the truth; while, if called upon to answer a bill of discovery under oath, the defendant's answer, if responsive to the allegations of the bill, must be overthrown by the evidence of two witnesses, or of one witness and other circumstances equivalent to a second. Besides, if complainant has other evidence sufficient to overthrow defendant's answer under oath, he has no occasion for a discovery. It would seem that a discovery by answer under oath, may, now, be advantageously waived by the complainant in, at least, a great majority of cases. No *such* discovery is needed when the proofs can be otherwise made, and when it cannot be thus made, the evidence can be brought out, ordinarily, much more advantageously to the complainant, and less effectively for the defendant, by a skillful, sharp oral examination of the defendant as a witness. Since I have occupied a seat on the circuit court bench, I have been surprised, to see how carelessly, if not recklessly, or ignorantly, solicitors for complainants, often, not to say, generally, throw away the advantages of their position by not waiving an answer to a bill in equity under oath. In this case there was no positive testimony that defendants made, or sold, the boots. Only one witness testified that he thought his firm bought the boots of defendants. I am compelled to say, that this testimony is insufficient to overthrow the positive denials of the answer, or to establish an infringement. The burden was on the complainant, to show that fact by affirmative evidence. It is not necessary to investigate the other points. The bill is dismissed on the grounds, alone, of an insufficiency of the evidence to show an infringement; and failure, also, to show an infringement before the filing of the bill.

UNITED STATES *v.* WILLIAM MARTIN.

CIRCUIT COURT, DISTRICT OF OREGON.
FEBRUARY 3, 1883.

1. INDIAN COUNTRY—UMATILLA AGENCY.—Since the repeal of section 1 of the Indian intercourse act of 1834, (4 stat. 129), by section 5596 of the R. S., the only Indian country in the United States within the purview of that phrase, as used in chapter 4, title 28, of the R. S. are the tracts of land set apart by the authority of the United States, for the exclusive use and occupancy of particular Indian tribes, and known as Indian reservations: and the Umatilla reservation in Oregon is such Indian country.
2. CRIMES COMMITTED BY OR AGAINST AN INDIAN.—In the exercise of its constitutional power to regulate intercourse with the Indian tribes, congress may define and punish crimes committed by white men upon the person or property of an Indian, and *vice versa* within as well as without the limits of a state.
3. MURDER ON THE UMATILLA RESERVATION.—Congress having provided for the punishment of murder committed in the Indian country (sections 2145, 5329, R. S.), the United States circuit court for the district of Oregon has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man; and therefore it is a violation of section 5,398 of the R. S., for any one to resist or obstruct the execution of an order made by a circuit court commissioner, engaged in the examination of an Indian charged before him with the commission of murder, under such circumstances.

Before DEADY, District Judge.

James F. Watson, for the United States.

H. Y. Thompson, for the defendant.

DEADY, J. On January 9, 1883, an information was filed in this court by the district attorney, charging the defendant with a violation of section 5398 of the Revised Statutes which enacts: "Every person who knowingly and willfully obstructs, resists or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer or other person duly authorized, in serving or executing any writ, rule, or-

der, process, or warrant, shall be imprisoned not more than twelve months, and fined not more than three hundred dollars."

The information contains two counts. The first one alleges that on December 18, 1882, in this district, two Indians, namely, Petens and Capsualla, being then and there under the charge of an Indian agent, were duly arrested by the marshal of this district, upon a warrant duly issued by a commissioner of the circuit court for this district, upon a charge of murder committed by said Indians, in killing one Charles Mulheren, a white man, upon the Umatilla Indian reservation, in this district, and were, by the order of said commissioner, duly committed to the jail of Umatilla county, for examination before him on said charge, the defendant being then and there the keeper of said jail; and that afterwards, on December 19, said commissioner duly made and delivered to the deputy of said marshal an order, commanding him to bring said Indians before him for examination upon the charge aforesaid, who then and there attempted to execute the same, but was prevented from so doing by the defendant, who knowingly and willfully refused to deliver said Indians to said deputy, and by force and violence prevented the latter from executing said order.

The second count alleges that the defendant obstructed an officer in the execution of process in the case of two other Indians, namely: Ah Hoot and Weet Snoot, charged before said commissioner on December 7, 1882, with the killing of said Charles Mulheren, on said reservation, on which day they were duly committed by the order of said commissioner to the custody of P. McDowell, the keeper of the town jail of Pendleton, in said county, for examination on said charge; and that on December 18, the defendant took said Indians from the custody of said jailor of Pendleton—they being then and there in the custody of the latter under the order of the said commissioner.

Upon the filing of the information a warrant issued upon which the defendant was arrested, and held to bail in the sum of one thousand dollars. The defendant demurs to

the information, and for cause alleges substantially that "the courts of the United States do not have jurisdiction to try the Indians named in the information for the crime with which they are charged," and therefore the order or process which the officer was attempting to execute was void, and not within the purview of the statute.

The question made by this demurrer was considered and decided by this court in *United States* v. *Bridleman*, 7 Saw. 243—an information charging a white man with stealing from an Indian on this same reservation. In that case it was held that this court has jurisdiction of a crime committed on the Umatilla reservation, by a white man, upon the person or property of an Indian and *vice versa;* provided the crime is defined by a law of the United States directly applicable to the Indian country, or made so by sections 2145–2146 of the Revised Statutes, which enact:

"Sec. 2145. Except as to crimes, the punishment of which is expressly provided in this title [28], the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the district of Columbia, shall extend to the Indian country."

"Sec. 2146. The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offence in the Indian country, who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively."

The punishment of the crime of murder, committed in a place within the sole and exclusive jurisdiction of the United States, is provided for in section 5339 of the Revised Statutes, which enacts: "Every person who commits murder within any fort, arsenal, dockyard, magazine, or in any other place, or district of country, under the exclusive jurisdiction of the United States, * * * shall suffer death." This section is made applicable to the Indian country by section 2145 of the Revised Statutes, *supra*; and if the Uma-

tilla reservation is "Indian country" within the purview of the statute, the United States circuit court for this district has jurisdiction to try these Indians upon this charge of murder.

That the reservation is Indian country was held in *United States* v. *Bridleman, supra.* In that case the origin of this reservation and the power of congress to regulate intercourse with the Indian tribes was stated as follows: "On June 9, 1855, a treaty was made with the Walla Walla, Cayuse, Umatilla, and other tribes and bands of Indians in Oregon and Washington territory, by which the reservation in question was set apart for the exclusive use of the Indians, in consideration of their ceding their right to a large extent of country. The treaty (12 Stat. 945), provides that the reservation 'shall be set apart as a residence for said Indians, which tract for the purposes contemplated shall be held and regarded as an Indian reservation; * * * all of which tract shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without permission of the agent and superintendent.'"

"On February 14, 1859 (11 Stat. 383), the state of Oregon, with exterior boundaries, including the Umatilla reservation, was 'received into the union on an equal footing with the other states in all respects whatever,' without any proviso or provision concerning the Indians or Indian reservations therein."

"On March 8, 1859, the treaty was ratified by the senate, and on April 11th it was proclaimed by the president. The power to regulate commerce with the Indian tribes (U. S. Con., art. 1, sec. 8) includes not only traffic in commodities, but intercourse with such tribes—the personal conduct of the white and other races to and with such tribes and the numbers thereof, and *vice versa.*" (*Gibbons* v. *Ogden*, 9 Wheat. 189; *United States* v. *Holliday*, 3 Wall. 416.)

"If the power to regulate the intercourse between the Indian and the white man includes the power to punish the latter for giving the former a drink of spirituous liquor within the limits of a state, as it undoubtedly does (*United*

States v. *Holliday*, *supra*), then it must follow that the power to regulate such intercourse extends to and includes the power to punish any other act of a white man having or taking effect upon the person or property of an Indian, within such limits, and *vice versa*, even to the taking of life."

"It is admitted that the power of congress to provide for the punishment of an act, as a crime, is limited to the subjects and places peculiar to the national government. Its power to do so arises from the locality of the act in question, when it is committed in a place within the exclusive jurisdiction of the United States, as its territories, forts, arsenals, etc., and from the subject, when the punishment is imposed as a means of carrying into execution or enforcing any of the powers expressly granted to congress by the constitution—as the power to lay and collect taxes, to borrow money, to regulate commerce," etc.

"This intercourse is a subject of federal jurisdiction, the same as the naturalization of aliens, the subject of bankruptcies, or the establishment of post-offices, and therefore congress may pass laws regulating or even forbidding it, and providing for the punishment of acts or conduct growing out of it or connected therewith, resulting in injury either to the Indian or the other party, or calculated to interrupt or destroy its peaceful or beneficial character."

"Upon the national government is devolved the power and duty to supervise and control the intercourse between the Indians and its citizens, so that, so far as possible, each may be protected from wrong and injury by the other; and in the exercise of this power and the performance of this duty, it is not limited or restrained by the fact that the Indians are within the limits of a state. The Indians were here before the state was, and the state was formed and admitted into the union subject to their right to remain here, and the power of congress over the intercourse between them and the people of the state, until they are removed, or become a part of the latter, through the agency or with the consent of the United States."

By this treaty, which was ratified after the admission of

the state into the union, and took effect by relation from the date of its signing, (*United States* v. *Reynes*, 9 How. 143; *Davis* v. *The Police Court*, Id. 285; *Haver* v. *Yaker*, 9 Wall. 34) this Umatilla reservation was set apart for the "exclusive use" of the Indians named; and no white person was allowed "to reside upon the same," without the permission of the United States. And this treaty, like every other made by the authority of the United States, is the supreme law of the land. (U. S. Con., art. VI, subd. 2; *Worcester* v. *Georgia*, 6 Pet. 515.)

In *United States* v. *Forty-three Gallons of Whisky*, 93 U. S. 188, Mr. Justice Davis, speaking for the supreme court, says: The power to regulate commerce with the Indian tribes, is "as broad and free from restrictions as that to regulate commerce with foreign nations; that it is not confined to any locality," but "its existence necessarily implied the right to exercise it, whenever there was a subject to act upon, although within the limits of a state." Thus a treaty with a foreign nation may provide that the subjects of such nation may take real property situated in the United States by devise or descent, and although this may contravene the law of the state where the property is situated, such law must yield to the treaty which the constitution makes supreme. (Id. 197.)

It may be conceded that the admission of Oregon into the union upon an equality with the other states, without any special reservation of jurisdiction over the place then known and occupied as the Umatilla Indian reservation, extended the jurisdiction of the state thereover as to all subjects constitutionally within its power of legislation—such as a crime committed thereon by one white man upon another, and it may be by one Indian upon another.

But the subject of the intercourse between the Indians and other people in Oregon, still remained a matter within the jurisdiction of the United States, just as much as when the country was a territory. In the case of the *United States* v. *Leathers*, 6 Saw. 17; and the *United States* v. *Sturgeon*, Id. 29, it was held in the district court of Nevada that an Indian reservation, established in Nevada on March 3, 1873—after

the admission of the state into the union—by a mere executive order for "the use" of certain Indians, and afterwards incidentally recognized as such by congress, was "Indian country," within the meaning of sections 2139 and 2148 of the Revised Statutes, providing for the punishment of persons who reside or trade in the Indian country without license, or return thither after being removed therefrom, or introduce spirituous liquors into such country, or dispose of the same to an Indian therein. On error from the circuit to the district court both these cases were affirmed by Judge Sawyer.

In this case, the government of the United States, in the exercise of its constitutional power to regulate trade and intercourse with the Walla Walla, Cayuse, Umatilla, and other tribes and bands of Indians in Oregon and Washington territory, through the action of the proper officers, established this reservation, while yet the state was a territory, and negotiated a treaty with these Indians, by the terms of which, they were to reside thereon, separate and apart from the whites, under the care and direction of the general government. The state was admitted into the union without any provision on the subject, *pro* or *con;* but immediately thereafter the treaty was ratified by the senate, and became the supreme law of the land. Nothing has since been done to modify it or limit its operation. The reservation has been exclusively occupied by the Indians, under the treaty, ever since they first went upon it, and congress has continually recognized it by annual appropriations, in pursuance of the treaty stipulations, for its support and the maintenance of an agent for the Indians thereon.

The case is on all fours with the Nevada cases, except that this reservation was established by treaty instead of an executive order, and that the crime alleged to have been committed by these Indians is murder. But the difference in the mode of establishing the two reservations is not material, and if it were, this reservation has more claim to be considered "Indian territory" on that ground, than the Nevada one. And the punishment of murder committed in the Indian country by the killing of a white man by an In-

dian, and *vice versa*, is as plainly provided for in section 2145 of the Revised Statutes as either of the crimes charged in *United States* v. *Leathers*, and *United States* v. *Sturgeon*, *supra*. Indeed, the only point in the case that is at all open to argument, is the question, whether the Umatilla reservation is Indian country or not.

It is admitted that there is no express definition in the Revised Statutes, as there ought to be, of what constitutes Indian country. Section 1 of the intercourse act of June 30, 1834 (4 Stat. 729) defining the boundaries of the then Indian country has been repealed by section 5596 of the Revised Statutes.

In the progress of legislation for and the occupation of the country included therein, it had before that time become practically obsolete. And now, unless the tracts of country included in the reservations established by the general government for the exclusive use and occupation of the several Indian tribes, are "Indian country," there is none in the United States, and all the provisions in the revised statutes relating to it and providing for the punishment of crimes committed therein are nugatory and without effect for want of a subject to operate on. But so long as there is any reasonable ground to hold otherwise, this court cannot assume that congress was fatuous enough to enact chapter 4 of title 28 of the Revised Statutes, concerning the "government of the Indian country," when there was no Indian country to govern.

Ever since the phrase "the Indian country" found its way into the federal legislation, it has been used to signify not only a place or tract of country actually occupied by Indians, but also a tract so occupied by them and set apart or designated as exclusively for their use under and by the authority of the United States. In the progress of time what are known as "the Indian reservations" have come to be the only country so occupied by them; and these now constitute the Indian country of the United States, and there is no other. And they are such in both law and fact. In *Forty-three Gallons of Brandy*, 11 Fed., Ref. 47, Mr. Justice McCrary held that section 1 of the intercourse act of 1834, *supra*, was re-

pealed by section 5596 of the Revised Statutes, and that in his judgment the phrase "Indian country" as used in the Revised Statutes now only includes "that portion of the public domain which is set apart as a reservation, or as reservations, for the use and occupancy of the Indians, and not the whole vast extent of the national domain to which the Indian title has not been extinguished." Upon a rehearing of this case (14 Fed. Rep. 539) the learned judge said: "An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe of Indians. It may be set apart by an act of congress, by treaty, or by executive order." See also upon this point *United States* v. *Bridleman*; *United States* v. *Leathers*, and *United States* v. *Sturgeon*, *supra*.

All the authorities cited by counsel for defendant, namely: *United States* v. *Ward*, 1 Wool. 17; *United States* v. *Yellow Sun*, 1 Dill. 271; and *United States* v. *McBratney*, 104 U. S. 621, except the latter, were cited and examined in *United States* v. *Bridleman*, *supra*, and shown not to be in conflict with this conclusion. In *McBratney's Case*, the defendant, a white man, was convicted in the circuit court of the United States for the district of Colorado, of the murder of a white man upon the Ute Indian reservation, the same being within the state of Colorado. Upon a motion in arrest of judgment, the opinions of the circuit justice and district judge were opposed upon the question of whether the circuit court had jurisdiction of the crime of murder committed under those circumstances; and the same was certified to the supreme court, who answered it, by Mr. Justice Gray, in the negative.

But that case does not touch the question under consideration here. It is not claimed in this case that the United States has any other jurisdiction over this reservation than that which is incident to its power to regulate the intercourse between the whites and Indians thereon. Of course, this does not include the case of a crime committed there by one white man upon another, for that is a matter which does not concern or affect such intercourse. And therefore Mr. Justice Gray, in the con-

clusion of his opinion, is careful to say that the decision in that case does not affect any question "as to the punishment of crimes committed *by or against Indians*."

The case of the *State* v. *Doxtater*, 37 Wis. 278, was also cited by counsel for defendant. In that it was decided that the state had jurisdiction of the crime of adultery committed on the Oneida reservation, in Wisconsin, by an Indian man with a white woman; but that does not touch the question of whether the United States has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man.

The demurrer is overruled, and the defendant is ordered to appear for arraignment.

PATRICK KELLY *v.* GEORGE K. PORTER ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
FEBRUARY 5, 1883.

1. LICENSE PENDING APPLICATION FOR PATENT—MODIFIED CLAIMS.—An inventor filed in the patent office his specifications, claims, and application for a patent. He then entered into a contract with other parties, describing his invention, setting forth therein that he had filed his specifications and application for a patent, and granting "the exclusive right and privilege of manufacturing and selling the aforesaid goods *under any patent that he might obtain by or through his application aforesaid*," in a large tract of territory described. Afterwards, upon the requirement of the commissioner, the claims appended to the specifications were modified, and in accordance with such modified claims the patent issued. *Held:* That the license covered the patent issued upon the claims as modified.
2. LICENSE, WHEN IRREVOCABLE.—A license to use a patent given pending the application for its issue, unlimited as to time, and providing, only, that it should be void on failure to obtain the patent, wherein the licensor covenants to protect the licensee "against any and all persons, during the term of the application for a patent, as aforesaid, and *after he shall have obtained a patent* from the United States government, as aforesaid," is irrevocable by the licensor, without the consent of the licensee.
3. LICENSEE NOT AN INFRINGER.—A party manufacturing and selling a patented article, in pursuance of the terms of a licensee from the patentee, cannot be held liable, as an infringer.

4. LICENSEE ONLY LIABLE FOR ROYALTY.—The only remedy of a patentee against a party manufacturing under a license, is upon the contract granting the license for the royalty agreed upon.
5. JURISDICTION—LICENSE.—An action by the patentee against his licensee for the stipulated royalty, presents no question of patent law, and no subject-matter, which can give the national courts jurisdiction on that ground.

Before SAWYER, Circuit Judge.

THE contract construed is as follows:

"Whereas, Mr. P. Kelly, of the city and county of San Francisco, and state of California, has applied for and is now endeavoring to obtain from the United States government a patent on or for the inserting of an elastic behind the ankle of short legged bootees or gaiter boots, of which said Kelly claims to be the originator and inventor, together with all his style and cut, as in his plans and specifications accompanying said application set forth; and whereas, Porter, Oppenheimer, Slessinger & Co., of the city, county, and state aforesaid, are desirous of manufacturing and selling men's, youths', and boys' goods, and inserting an elastic behind the ankle, as aforesaid, therefore the said P. Kelly hereby covenants and agrees to give and grant to the said Porter, Oppenheimer, Slessinger & Co., the exclusive right and privilege of manufacturing and selling the aforesaid goods under any patent that he may obtain by or through his applications as aforesaid, in the state and territories of California, Oregon, Nevada, Montana, and Colorado, Idaho, Washington, and Utah; but the said Kelly hereby reserves the right to manufacture said goods for retail purposes in his own store. And the said Porter, Oppenheimer, Slessinger & Co. hereby covenant and agree to pay to the said P. Kelly the sum of three dollars per dozen (of twelve pairs) as royalty for the privilege of manufacturing and selling said goods as aforesaid, for all other kinds of goods made and sold by them as aforesaid. But it is hereby agreed that no royalty shall be paid to said P. Kelly for any goods manufactured by Porter, Oppenheimer, Slessinger & Co. for the said P. Kelly. And it is further agreed, that any goods made and sold as aforesaid by Porter, Oppenheimer, Slessinger & Co. shall be sold by them

on the conditions that the party purchasing the same shall not sell such goods at retail in the city and county of San Francisco, except by the said P. Kelly. And the said P. Kelly further covenants and agrees that for and in consideration of the royalty paid to him as aforesaid, that he, the said Kelly, will protect the said Porter, Oppenheimer, Slessinger & Co. in the rights hereby granted as aforesaid, against any and all persons during the term of the application for a patent as aforesaid, and after he shall have obtained a patent from the United States government as aforesaid. And it is further agreed by and between the parties hereto, that if the said P. Kelly from any cause fails to obtain a patent as aforesaid, or does not protect said Porter, Oppenheimer, Slessinger & Co. in the manufacturing and selling said goods as aforesaid, then, and in that event, the said Porter, Oppenheimer, Slessinger & Co. shall not pay unto the said P. Kelly any sum or royalty for the privilege hereby granted. And if the claims by Kelly for a patent are rejected by the United States government, Porter, Oppenheimer, Slessinger & Co. shall not pay unto the said Kelly any royalty from and after the date of the rejection of his claims for a patent as aforesaid. And in the event the said P. Kelly's claims for a patent, as aforesaid, are rejected by the United States government, then this agreement shall cease, and become null and void. And it is further agreed, by and between the parties hereto, that if the said P. Kelly obtains a patent as aforesaid, then and in that event, the royalty of one dollar and fifty cents, to be paid as aforesaid, may be changed in any manner that the parties hereto may agree upon.

"PORTER, OPPENHEIMER, SLESSINGER & Co. [SEAL.]
"P. KELLY. [SEAL.]

"Signed, sealed, and delivered in presence of
"JOHN HEIN.

"San Francisco, March 8, 1879."

Wheaton & Harpham, for complainants.

Boone & Miller, for defendant.

SAWYER, Circuit Judge, delivering an oral decision. This is a demurrer to a bill in equity to enjoin the infringement of a patent. The bill was originally filed without setting out a contract, which existed between the parties; and defendants by plea set it up as a defense. The complainant, then, amended his bill, and set out the contract. The defendants rely upon this contract, claiming that it is a license, and that the alleged infringement of the complainant's patent, is, merely manufacturing and selling the patented articles under and by authority of that license.

The complainant insists under the bill, as now drawn, that it appears that the patent, as issued, is not covered by the license, because there was a change made in the *claims* of the original application for the patent, so that they differ in the patent issued from the claims as they existed in the application, when the specifications were first filed, and at the date when this contract was entered into. The commissioner of patents refused to grant the patent on the claims as first made, and they were, therefore, modified, and the patent was finally issued on the modified claims, based upon the original application, and specifications.

The complainant's counsel insist, in the first place, that the license does not extend to the patent as issued. But I think he is mistaken in that proposition. In the license the invention is described, and the facts set forth, that the inventor has made his application for a patent, and filed his specifications; and the license is then granted, "with the exclusive right and privilege of manufacturing and selling the aforesaid goods *under any patent* that he (the inventor) *may obtain by or through his application, as aforesaid,* in the states and territories of California, Oregon, Nevada, Montana, Colorado, Idaho, Washington, and Utah." The only change made in the application, was, in respect to the claims, which change was made pursuant to the decision of the commissioner that the invention was not properly covered by the claims, as originally drawn. The patent was then issued upon the original application, as thus amended, for the invention described, and comes plainly within the terms of the contract licensing the defendants to manufacture and

sell goods "under *any* patent that he may obtain *by or through his application*."

I think, therefore, that the right of respondents to manufacture and sell the goods described is established by the license.

But, in case he should find himself mistaken in regard to this first proposition, complainant next alleges in his bill, that he has revoked the license; that he has served upon the defendants a written revocation of it; and claims, therefore, that the license has ceased to be operative. Here the question arises, as to whether, or not, the complainant is authorized to make such a revocation. There is nothing in the license which authorizes the revocation, or limits the time that the license is to remain in force. It contains this clause: "And the said P. Kelly further covenants and agrees, that for and in consideration of the royalty paid to him as aforesaid, he, the said Kelly, will protect the said Porter, Oppenheimer, Slessinger & Co., in the rights hereby granted, as aforesaid, against any and all persons *during the term of the application for a patent* as aforesaid, and *after he shall have obtained a patent from the United States government, as aforesaid.*" There is nowhere in the contract any limitation as to time, and no right of revocation reserved in terms. The only other clause that can affect the question is: "In the event the said P. Kelly's claims for a patent, as aforesaid, are rejected by the United States government, then this agreement shall cease, and become null and void." Thus it is provided in express terms under what circumstances the contract shall be abrogated; and, having named those terms, it must be presumed that they cover all the contingencies contemplated by the parties upon which the contract should cease.

The defendants agree to pay the royalty for all the goods they manufacture, embracing the invention even *before* the patent issued, when it was not certain that a patent would ever issue, or that they would ever be under any obligation to pay a royalty; and, undoubtedly, securing the right to continue to manufacture after the patent should issue, was an important part of the consideration in the view of the

defendants, while receiving the royalty for the goods manufactured before the patent issued, was, doubtless, deemed of no little importance by the parties applying for a patent. It may have been, and, doubtless, was, a very important consideration in the view of both parties. The great extent of territory covered by the license, as stated, was important and valuable, in case the patent should issue, and it is provided that the defendants are to be protected, not, only, during the pendency of the application for the patent, but, also, after the patent should issue, showing that the parties did not contemplate any revocation, as soon as the patent should be obtained. The complainant ought not to be permitted to avail himself of the consideration valuable to himself, and then, as soon as the patent issued and became valuable, repudiate that part which is valuable to the licensee.

I think that the license runs for the entire term of the patent, and I do not think the complainant has a right to revoke it, there being no stipulation to that effect within the contract. And such, I think, is the proper construction, upon a consideration of the entire contract. I find no case, however, in which this question has been, directly, decided; but there are analogies favoring the view adopted. It seems to me, that it would be a very one-sided contract; in fact, equivalent to no contract at all, if the complainant could, on the very next day, or as soon as the patent issued, revoke it.

I think, therefore, that this license is irrevocable, unless by some fault of the parties, or by their mutual consent. Being irrevocable, the license is still in existence, and the defendants are manufacturing under that license, and are, therefore, not liable as infringers.

The defendants do not dispute the validity of the patent, and do not deny, that they have manufactured goods of the character described in the patent. It is simply a question, then, of a cause of action arising upon the license. The only thing that can be recovered from the defendants, is, the royalty agreed upon for the quantity of boots and shoes manufactured by them, containing the complainant's patented improvements. Being simply a suit on the license—

on the contract between the parties—there is no question here arising under the patent law; and there is no jurisdiction in this court to entertain such a suit on the ground of subject-matter, and no other ground of jurisdiction is shown. There is no jurisdictional fact, such as might arise from the character of the parties, to bring the case within the jurisdiction of this court. (*Tilghman* v. *Hartell*, 2 Ban. & Ard. 260.)

The demurrer must be sustained and the bill dismissed, and it is so ordered.

SAMUEL BROWN *v.* J. N. EVANS.

CIRCUIT COURT, DISTRICT OF NEVADA.
FEBRUARY 5, 1883.

1. EXEMPLARY DAMAGES.—In vindictive actions, such as assault and battery, slander, libel, seduction, etc., where fraud, malice, cruelty, oppression, brutality, or wantonness is shown, on the part of the defendant, exemplary damages may be recovered.
2. WEALTH OF DEFENDANT.—In the above class of actions evidence may be given of defendant's wealth.
3. CRIMINAL LIABILITY OF DEFENDANT.—Exemplary damages may be recovered in a civil action, although the act complained of may be a crime, or misdemeanor, and subject the defendant to criminal prosecution therefor.
4. GOOD CHARACTER.—In actions for damages for assault and battery, evidence of defendant's former good character is not admissible.
5. NEW TRIAL—CUMULATIVE EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence, when such evidence is merely cumulative, or is upon unimportant matters in the case, or where, in the opinion of the court, such evidence, if produced, would not affect the action or verdict of a jury.
6. EXCESSIVE DAMAGES.—A new trial will not be granted on the ground of excessive damages, in an action of personal tort, unless it appear that the jury were influenced by passion, prejudice, corruption, or willful disregard of law, in assessing such damages.

Before SABIN, District Judge.

THIS is an action brought by plaintiff to recover from defendant the sum of twenty thousand dollars damages alleged to have been sustained by plaintiff by reason of an as-

sault and battery committed by defendant upon plaintiff on or about the thirtieth day of March, A. D. 1881, at the town of Reno, county of Washoe, state of Nevada. The cause was duly tried in this court, at the November term thereof, 1882, Hon. Lorenzo Sawyer, circuit judge, and Hon. G. M. Sabin, district judge, presiding. The jury returned a verdict for plaintiff in the sum of eight thousand one hundred and fifty dollars and eighty-seven cents, and judgment was thereupon duly entered for said sum and costs in favor of plaintiff. Thereafter counsel for defendant duly moved the court to set aside said verdict and judgment and to grant a new trial herein. The motion was argued orally by counsel for the respective parties before Sabin, J., presiding, and was submitted on briefs filed. The grounds of defendant's motion for a new trial are stated in the opinion of the court, pronounced February 5, 1883, when said motion was denied.

R. M. Clarke, for the motion.

R. H. Lindsey and W. E. F. Deal, contra.

SABIN, J. This action was brought by plaintiff in the proper state court (and afterwards removed to this court), to recover from defendant the sum of twenty thousand dollars damages alleged to have been sustained by plaintiff by reason of a most brutal, unprovoked, and wanton assault and battery committed by defendant upon plaintiff, March 30, 1881, at the town of Reno, in the county of Washoe, state of Nevada, accompanied by acts of great atrocity, and nearly culminating in the death of the plaintiff.

The defendant pleaded a qualified denial and justification of the assault, but it is very difficult, in fact, impossible, to reconcile the verified answer of the defendant with his testimony given in his own behalf, upon the trial of the case. The jury found for the plaintiff in the sum of eight thousand one hundred and fifty dollars and ninety-seven cents, and judgment was duly entered upon the verdict for said sum and costs. Defendant now moves the court to set aside that verdict and judgment and that a new trial of the action be

granted. I have carefully examined the authorities attainable, cited by counsel on either side, and many not cited in their briefs or in this opinion.

The first question that meets us in the discussion of this motion is this: Was and is this a case wherein exemplary, punitive, or vindictive damages can be allowed or assessed by the jury against the defendant? The terms "exemplary, punitive, or vindictive damages," are synonymous in their legal signification. This question was held in the affirmative by the court upon the trial of the case. If the court was in error on this point a new trial might be granted, since, in that case, the action was tried upon a wrong theory of the law applicable thereto, and thus improper evidence may have been submitted to the jury.

It may be laid down as a general proposition of law, elementary in character, that in all this class of cases of personal torts, "vindictive actions," such as assault and battery, slander, libel, seduction, *crim. con.*, malicious arrests and prosecutions, seizure of goods, etc., where the elements of fraud, malice, gross negligence, cruelty, oppression, brutality, or wantonness intervene, exemplary or punitive damages may be recovered from the defendant.

The authorities supporting this proposition are too numerous to cite or review here. An examination of a few of the authorities will establish the fact that this has been the settled law of this country for more than one hundred years, and that such is now the law in nearly all the states of the union. Nebraska, I believe, is a solitary exception to the rule. The supreme court of that state holds, that under no circumstances can exemplary damages be recovered. The English cases run much further back in point of time, and the American cases are generally in harmony with them.

I am able to refer to only a few of the cases examined on this point, but it is believed that the following cases fully establish the doctrine of exemplary damages in proper cases, and are fair exponents of the great body of American law on this subject. (See 1 Sedgwick on Damages, 53, 174; 2 Id. 323, and note; also pages 335–344; 13 How. (U. S.) 371; 91 U. S. 493; 3 McLean's C. C. (U. S.) 23; 21 Iowa,

379; 4 Duer, 247; 5 Watts, 375; 13 Iowa, 92; 27 Am. Dec. 685, and notes; 1 Head, 336; 43 Me. 163; 64 N. Y. 440; 24 Wis. 292; 81 Ill. 70; 2 Metc. (Ky.) 146; 6 Tex. 266; 27 Miss. 68; 39 N. H. 576; 43 Miss. 598; 51 Id. 103; 44 Wis. 282; 3 Scam. 372; 4 Wis. 67; 99 Mass. 552; 114 Id. 518; 2 Cal. 54; 40 Id. 578; 45 Id. 337; 10 Ohio St. 292; 27 Id. 277; 48 Mo. 152; Field on Damages, 70; 2 Greenl. Ev., sec. 267.)

In 3 Scam. 373, the court says: "In vindictive actions * * * the jury are always permitted to give damages, for the double purpose of setting an example and of punishing the wrong-doer." And such is the doctrine of the cases above cited, and of many more examined and not cited.

There was no error in the ruling of the court that this was a case in which exemplary damages might be recovered, and should be allowed.

I now proceed to consider the grounds urged for a new trial *seriatim*, as stated by defendant's counsel in his brief.

1. That the court erred in admitting evidence of defendant's wealth.

In this ruling there was no error, this being a vindictive action, in which exemplary damages might be recovered. (See 49 N. H. 358–370; Field on Damages, 78, 127, 128, 479, 554, and note; 2 Greenl. Ev., sec. 269; 27 Miss. 68, 85, 86; 52 Me. 502; 15 Wis. 240; 5 Watts, 375; 44 Wis. 282, 291–294; 4 Duer, 247, 262; 13 Iowa, 92; 4 Wis. 67; 3 Scam. 372; 6 Conn. 24, 27; 48 Mo. 152; 27 Ohio St. 292; 2 Sedgwick on Damages, 323 and note, 331; 20 Ill. 115.)

The reason of the rule is obvious. If exemplary damages may be given by way of punishment for an outrageous act, the jury must know something, at least, of the defendant's ability to respond in damages, since what would be a severe verdict to one with limited means might be but a trifle to one of large means, and the rule utterly fail.

2. "The act complained of, and out of which the damages arose, is a misdemeanor, punishable by fine and imprisonment, and punitive damages cannot be recovered."

This point is not well taken. The fact that a party com-

mitting a flagrant wrong upon another subjects himself to criminal prosecution and punishment, is no ground for withholding exemplary damages in a civil action for the same act. (See 6 Tex. 266; 21 Iowa, 385, 388–391; 26 Id. 185; 44 Wis. 282; 1 Head, 336; 27 Am. Dec. 685, and note 687; 4 Duer, 247, 265; 2 Sedgwick on Damages, 330, and note 332; 2 Cal. 54; 2 Metc. (Ky.) 152; 18 Mo. 71; 6 Hill, 466; 1 Bish. Crim. L., secs. 264, 265, and cases cited; Id., secs. 265, 266, and cases cited, 980 to 988; 14 How. (U. S.) 17–20.) The clause of the constitution of this state which is invoked to shield defendant from the penalty of exemplary damages, reads as follows: "No person shall be subject to be twice put in jeopardy for the same offence."

The constitution of the United States contains a similar provision. Now, the term "jeopardy," as used in the constitution, has a fixed legal signification, and is always used in connection with criminal proceedings. (1 Abb. L. Dic. 650; 3 Greenl. Ev., sec. 37; 1 Bish. Crim. L., sec. 1012, and as above cited.)

In 44 Wis. 287, the court, in discussing this point, in a case very similar to the one at bar, by Ryan, C. J., says: "It would have been no subject of regret to the court, if the obligation of the constitution called upon it to abridge the application of the rule. But the court is unable to hold that the constitutional provision has any controlling bearing on the question.

"The constitution only re-enacts what was the general, if not literally universal rule at common law. The word jeopardy is therefore used in the constitution in its defined, technical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, in formation, or otherwise.

"The cases generally hold that the rule in criminal cases, that one shall not twice be put in jeopardy, implies more than the bar of a judgment to an action for the same cause. But no case is known where a conviction upon an indictment has been held a bar to a civil action for damages growing out of the same act; *a fortiori*, none in which a recovery in a civil action has been held a bar to an indictment for

the same act. * * * It is manifest that judgment for the one is not a bar to the other."

If this objection has any weight or force, it has it by virtue of this constitutional provision above cited. It has no other support. Tested by the rules of law applicable to this matter of jeopardy, the objection will be found to be without merit or support. A person may, by one act, commit two offenses: one against the civil law, by the invasion of a private, personal right, the other against the state, in the violation of its criminal law. And he may be prosecuted for each offense, and yet not twice criminally punished for the same offense. In the one case the offending party makes reparation in damages for the civil wrong done to the person injured thereby; in the other, the party is punished by the state for an offense against it, in the violation of its law, and a judgment in the one case is no bar to a prosecution in the other. In like manner a person may, by one act, offend against two sovereignties. His act may be an offense against the laws of a state, and also against the laws of the United States, and he may be prosecuted and punished either by the state, whose laws he has violated, or by the United States, or by both, for his offense against each. (5 How. (U. S.) 432; 14 Id. 20; 1 Bish. Crim. L., secs. 986, 1,060.)

I am aware that it has been held in a few cases that exemplary damages cannot be recovered in cases of personal torts where the defendant is liable to a criminal prosecution for the same act. (See 5 Ind. 332; 14 Id. 479; 20 Id. 192; 4 Cush. 273.) In 53 N. H. 342, the subject is discussed, but not decided.

Defendant further insists that the court erred in admitting evidence of plaintiff's health prior to the assault and subsequent thereto, and of defendant's great and superior strength. There was no error in this. The jury was entitled to know the whole transaction. It could not do justice in any case without such knowledge. (2 Sedgwick on Damages, 330, note 1; Field on Damages, 474.) It was necessary that the jury should know the condition of plaintiff's health prior to the assault as well as subsequent thereto.

3. "The court erred in excluding evidence of defendant's good character." There was no error in this ruling of the court. The *character* of defendant was not in issue, directly or indirectly. The issue was, did he or not beat and wound the plaintiff as charged in the complaint? (See 1 Greenl. Ev., secs. 54, 55; 2 Id., sec. 269; Field on Damages, 473; 15 C. L. J., No. 22, p. 428.)

4 and 5. For the sake of brevity I consider the fourth and fifth grounds of defendant's motion together. They are based upon newly discovered evidence and surprise at the time of the trial. The surprise seems to have been at the proof of the extent of plaintiff's injuries inflicted by defendant. Now, defendant, and all persons, are held to intend the natural consequences of their acts. They are at least liable therefor. Says Tindal, C. J., 7 Bing. 211: "Every person must be taken to be answerable for the necessary consequences of his own wrongful acts." (See 2 Greenl. Ev., secs. 89, 224.)

As stated by Greenleaf, "the defendant must be presumed to be aware of the necessary consequences of his conduct, and therefore cannot be taken by surprise in the proof of them." This assault was committed more than eighteen months prior to the trial, and issue was joined in this action August 3, 1881. The plaintiff and defendant reside in the same village. Defendant knew or could have known plaintiff's condition from the day of the assault to the day of trial. He knew that the nature, extent, and probable duration of any injuries inflicted upon plaintiff would and must be fully investigated, and he should have been prepared to meet this investigation with his witnesses. His witnesses were all within easy attendance upon court. There was in the trial of the case no surprise of which defendant can complain.

The newly discovered evidence, as disclosed by the affidavits filed, is not of the character to warrant a new trial. (See 1 Graham & Waterman on New Trials, 464.)

I do not think the evidence of the new witnesses, as disclosed by their affidavits, would in the slightest degree affect the action or verdict of a jury. To a great extent this newly

discovered evidence is merely cumulative, and upon unimportant matters in the case, and defendant shows no diligence in procuring, or endeavoring to procure, at the trial, the attendance of the witnesses, whom he now insists are material and necessary. (See 24 Cal. 513; 45 Id. 337.)

Defendant fails to bring himself within the well-established rules of law, relative to new trials, on the ground of newly discovered evidence.

6. Counsel for defendant further insists that a new trial should be granted, because of the doubt, raised at the trial, as to whether or not plaintiff's upper jaw-bone—the superior maxillary bone—was broken. This is quite immaterial to the real issue in the case, to wit: did defendant assault plaintiff, as charged in the complaint, and was such assault justifiable? All of the medical testimony offered in the case established this fact, that the "alveolar process," in which the teeth are set, and which unites with and blends into the superior maxillary bone, was broken down, carrying with it the five front teeth in place.

Whatever injuries plaintiff received were caused by the acts of defendant. The jury heard all of the evidence on this point, and it was fully competent to determine what bones were or were not broken, and generally what injuries plaintiff received. Whether or not the upper jaw-bone proper was broken, or whether the alveolar process alone was broken down, or whether any bones were broken, was merely an incidental matter in the case, and cannot be permitted to supplant the real issues presented.

7. Upon the argument of this motion it was stated by defendant's counsel that the fifth and sixth grounds of error, as specified in the notice of motion for a new trial, were waived, and no argument was submitted thereon. The third ground of error, however, as specified in the notice of motion, to wit, "Excessive damages, appearing to have been given under the influence of passion or prejudice," was not waived, though counsel for defendant does not notice it in his brief. It therefore remains to be considered, which I will do as briefly as possible.

While it is true that courts reserve and sometimes ex-

ercise the power to set aside verdicts, on the grounds herein specified, yet it is a power always to be cautiously used, and which is rarely exercised in cases like the one at bar—cases of personal torts, where no certain rule for assessing damages can be laid down for the guidance of the jury. It is the peculiar and exclusive province of the jury in such cases to assess the damages.

In 12 Johns. 236, Spencer, J., in passing upon a motion for a new trial, based upon the ground of excessive damages, in an action of personal tort, says: "To justify the granting a new trial, the damages must be flagrantly outrageous and extravagant, evincing intemperance, passion, partiality, or corruption on the part of the jury." And this is generally the language of courts on this subject.

As stated in 7 Pick. 81, the damages must be so excessive "that all mankind would be struck at first blush with the enormity of the sum." And so, however it may be expressed by a court, the idea and principle always is that a court will not set aside a verdict, in an action of this character, except in extreme and exceptional cases.

Measured by this standard, this case does not come within the rule. I am not prepared, in this case, to say that the damages awarded by the jury are "flagrantly outrageous and extravagant, evincing intemperance, passion, partiality, or corruption on the part of the jury;" or that "all mankind" (or even a small portion thereof) "would be struck at the first blush with the enormity of the sum" awarded in this case. (See Field on Damages, 555, 683, 702; 1 Graham & Waterman, N. T. 425, 452; 2 Sedgwick on Damages, 652 and note, 657 and note, 346 and notes; 7 Pick. 81; 24 Cal. 513; 42 Id. 215; 45 Id. 337; 48 Id. 409.)

It would be an almost endless task to review the authorities on this subject—and they are uniform upon this question—that in all cases of personal torts it remains with the jury to fix the just amount of damages which shall be assessed against the defendant. And courts seldom interfere with this duty and prerogative of the jury.

How can I say in this case that the verdict is excessive? The defendant's own testimony in this case showed that

he was the aggressor; that he spoke the first insulting words; that he made the first hostile advances; that he struck the first blow; that plaintiff made no demonstration against him, except to throw up his arm to ward off another coming blow; that he knocked plaintiff down, and then struck him two heavy blows upon the face after he was down, plaintiff offering no resistance; that, seeing him lying senseless on the ground, he told some of plaintiff's employees, who were near, that they "had better go and take care of their boss;" that he informed other parties that "he had licked the d—d old Englishman." The evidence, wholly uncontradicted, further showed that after this assault, plaintiff remained insensible from one to two hours; that the nasal bones were broken and crushed "flat upon his face;" that the alveolar process of the upper jaw was broken down, with the five front teeth in place; that his face was horribly bruised and disfigured; that for ten days, at least, after the assault his life was in imminent peril; that during these ten days of struggle between life and death plaintiff suffered indescribable agony; that for six weeks he was closely confined to his room, under the care of nurses; that for three months he could eat only liquid and soft food; that the senses of sight, smell, and hearing were injured, and may never regain their natural condition; that he still suffers pain from the effect of his wounds; that his general health is impaired and may never be fully restored.

I do not know how the jury arrived at the result returned in their verdict. There are no scales in which we can weigh and determine the price and value of mental agony; no balances by which we may fix the solace for human suffering, wantonly inflicted; no standard by which we can measure the just compensation for wounded feelings, personal indignity, and public humiliation. The jury has passed upon this whole question, and with their verdict it must rest. Under the circumstances of this case, I have no legal right to set that verdict aside, and cannot do so.

It is probable that the jury allowed the sum of four hundred dollars and eighty-seven cents, the amount expended by plaintiff for physicians, nurses, and medicines, during

his recovery, and the further sum of seven hundred and fifty dollars, claimed by plaintiff for loss of time and expenses in hiring persons to attend to his business during his illness, and gave the further sum of seven thousand dollars as general damages.

It was further urged that the court erred in not withdrawing from the jury all evidence relative to defendant's wealth, plaintiff having, during the trial, waived all claim for exemplary damages. Had defendant's counsel, at the time of the trial, asked that this be done, the court would undoubtedly have withdrawn such evidence from the jury, and instructed them to disregard it. But no such request was made, and it is too late now to urge it as error. If it was technically error it was waived, and was wholly cured by the charge of the court to the jury.

The charge of the court was full, clear, and distinct. The jury was expressly instructed that all claim for exemplary damages was waived by plaintiff, and that they should only find, if they found for plaintiff, such sum as would compensate him for the expenses incurred by him during his illness, loss of time, and for the injuries sustained, including his physical suffering, mental anguish, and the indignity inflicted.

The charge I believe was in all respects correct.

The motion for a new trial is denied.

D. T. MATTESON ET AL. *v.* JOHN CAINE.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
FEBRUARY 5, 1883.

1. COMBINATION PATENT—INFRINGEMENT.—A patent for a combination of several elements, is not infringed by a machine which does not embrace all the elements employed to make up the combination, as claimed.
2. ANTICIPATION.—A plow standard, with a lug on the upper end, by means of which, it is fastened to the plow-beam by three bolts and nuts, not in line, but arranged in the form of a triangle, is anticipated by a cultivator standard fastened to the beam, or bar, by three bolts, arranged in the form of a triangle, although the head of the standard is square, instead of having a lug; and a standard having a bolt and nut with two dowel pins, similarly arranged, is also an anticipation.

Before SAWYER, Circuit Judge.

Wheaton & Harpham, for complainants.

J. H. Budd and J. L. Boone, for defendant.

SAWYER, Circuit Judge, delivering an oral decision. This is a bill upon the second reissue of a patent. The reissued patent contains two claims, the first of which is as follows: "The curved standard A, with the lug B, and the offsets D and E, substantially as and for the purpose described." That is a claim for the standard as a whole, but embracing certain elements, and is, in effect, a claim for a complete standard, made up of all those elements in combination; in other words, a patent for a combination.

The point is made here, that the bill does not embrace this first claim; but that the suit is brought for an infringement of the second claim, only, of the patent. I think otherwise. An infringement of the first claim is, clearly, within the scope of the bill.

A standard introduced in evidence by complainants, and marked "Exhibit C," shows the complainants' standard as now made; and another, marked "Exhibit S," shows it as formerly made by them; and the standard, "Exhibit B," made by defendant, is that which is claimed to be an infringement.

If Exhibit C is covered by the patent, then Exhibit B is an infringement. The question is, whether or not Exhibit C is constructed in accordance with the patent. I find this difficulty in relation to that exhibit. Exhibit C does not contain one of the elements of the combination described in the first claim of the patent, namely, the offset D. This offset, as well as the other elements, is very distinctly shown in the drawings of the patent, and described in the specifications, and is an element which is distinctly claimed as one of the features of the invention, as is shown by the following language in the specifications: "An *offset* is made at the point *D* of the standard, a little below the upper edge of the mold-board, and another at the point E, so that the

mold-board projects a little beyond the standard." The *offset D*, then, is one of the features of the invention described in the specifications of the patent, and it is, distinctly, claimed in the first claim as one of the elements of the combination, which makes up the completed standard in one piece, composed of the standard A, the lug B, and the two offsets D and E.

One of the elements of this combination, then, the offset D, is not contained in the standard, Exhibit B, which is claimed to be an infringement; nor is it in Exhibit C, which represents the standard as now made by the complainants; nor is it seen in Exhibit S, the standard originally manufactured under the patent. A standard which does not contain all of the elements of the patented combination is not an infringement. The combination is patented as an entirety. (*Coolidge* v. *McCone*, 2 Saw. 576, and cases cited; *Sarven* v. *Hall*, 5 Fisher, 427.) As defendant's standard does not contain the element referred to, offset D, I am compelled to hold that it is not an infringement upon the first claim of complainants' patent.

The second claim of the patent is: "A plow standard, constructed with the lug B upon its upper end, as described, so that the hole *b* may be outside of a direct line, with the holes *a*, *a*, substantially, as and for the purpose set forth." That claim is not in the original patent, or in the first reissue, but is, only, found in the second reissue. It is contended by the defendant, that the second claim is improperly inserted in the patent, but, for the purpose of my decision, I shall assume that it is a proper claim.

I find, however, that the invention intended to be covered by that claim, is anticipated by the devices shown in Exhibits 4 and 15. The only features of the standard-head, described in this claim is, the arrangement of the three bolts, and holes *a a* and *b*, one out of line with the other two, for the purpose of strengthening the attachment of the standard to the plow-beam. That device is simply a combination of the standard, with the bolt holes and bolts arranged as described—that is, arranged in the form of a

triangle, clearly giving a firmer support than would be given if they were arranged in a straight line.

Exhibit 4 is not a plow standard, but it is a cultivator standard, which is substantially the same thing, as the cultivator is, practically, a small plow, and the use of the standard-head on Exhibit 4 was of a date prior to the date of complainant's patent. The cultivator standard-head is not of the same shape as the head of the complainant's standard, but is square; but the arrangement of the bolts and bolt-holes is the same in both—the bolts and holes being arranged in a triangle in the square head—and the purpose of strengthening the attachment to the beam is accomplished by both in precisely the same way, and by the same means. The difference in shape of the two heads is of no consequence. It does not matter whether the head of Exhibit 4 was made as there shown, square, or whether pieces were cut out of its sides, or two of its corners cut off so as to make a lug or triangle on it, like that in complainant's standard-head. Substantially, they are the same. The bolts and holes are arranged in the same way in the head.

Exhibit 15 is also a cultivator standard, which was in use several years anterior to the date of the patent. The head of that standard also has the three holes, one out of line with the others. Only one of these holes, however, was for a bolt to pass through to be fastened with a nut, but the other two were made to receive dowel-pins instead of bolts. But the bolts are the equivalent of the dowel-pins; and the purpose in both cases is the same—to strengthen the attachment of the standard to the beam. Exhibit 15, then, is, a complete anticipation of the invention covered by the second claim of the patent.

Another standard-head introduced in evidence, which was made by Sperry, shows this same arrangement of the three holes out of line one with the others. But the evidence as to prior use by Sperry is not very satisfactory. Three or four witnesses for the defendant state that it was made and used by Sperry twenty years or more ago; but there is testimony to the contrary on the part of complainants. One witness testified that Sperry died about twenty years ago,

which is very indefinite. Defendant insists that this so called Sperry standard was made before Sperry died, and before the date of plaintiff's invention. Mr. Matteson, however, states that he had a conversation with Sperry, in which Sperry called his attention to his tenon-head standard, and asked him if he could not rig another head for it; that he told Sperry that he could, and showed him the standard-head described in the patent; and that Sperry's standard was thereupon changed, upon Matteson's suggestion, and the Matteson or patented head substituted for the tenon-head.

As I have stated, the testimony in relation to the prior use of this Sperry standard-head is not satisfactory. But the standard-heads upon Exhibits 4 and 15, I think, clearly show an anticipation of the device described in the second claim of complainant's patent. I shall, therefore, be compelled to find against the validity of that claim upon that ground.

A decree will be entered dismissing the bill.

SAMUEL BROWN *v.* J. N. EVANS.

CIRCUIT COURT, DISTRICT OF NEVADA.
FEBRUARY 5, 1883.

1. MOTION FOR NEW TRIAL, NO WAIVER.—A motion for a new trial is not a waiver of a writ of error.
2. JUDGMENT, WHEN FINAL, PENDING MOTION.—Where a motion for a new trial has been made, and entertained by the court, the judgment in the case does not become final and effectual, for purposes of review before the supreme court, until the date of the order of court overruling such motion.
3. SUPERSEDEAS.—A writ of error may serve as a supersedeas if duly served within sixty days, Sundays exclusive, from the date of an order made, denying a motion for a new trial.
4. EXECUTION, WHEN RECALLED.—Where an execution has been prematurely issued, it will be recalled, upon motion made for that purpose.

Before SABIN, District Judge.

MOTION to recall execution.

R. M. Clarke and N. Soderberg, for the motion.

R. H. Lindsey and W. E. F. Deal, contra.

SABIN, J. This is a motion made by defendant to recall an execution, issued in this action February 8, 1883, upon the ground that the same was prematurely and improvidently issued. The defendant tenders a *supersedeas* bond, in double the amount of the judgment herein, with good and sufficient sureties, as admitted by plaintiff's counsel, and advises the court of his purpose of suing out a writ of error in this action, which may serve as a *supersedeas* in this court, as soon as his bill of exceptions is settled and allowed, and of giving the security required, to the end that the case may be reviewed in the supreme court.

On the eleventh of November, 1882, at the present term of court, judgment was duly entered in this action against the defendant, upon the verdict of a jury rendered on that day in favor of plaintiff for the sum of eight thousand one hundred and fifty dollars and eighty-seven cents and costs. On the sixteenth of November, 1882, defendant filed in court a notice of motion for a new trial, and thereupon the court, on motion of defendant, on said day, entered an order staying execution upon the judgment pending said motion for a new trial. On the fifth of February, 1883, the court denied the motion for a new trial.

The real contention in this matter is this: When does the time—the sixty days given by statute—within which defendant must serve and file his writ of error in order that it may serve as a *supersedeas*, begin to run? If, as defendant contends, the time begins to run, in cases where a motion for a new trial is made, only from the date of the decision of such motion by the court, then the execution in this case may have been prematurely issued—the motion for a new trial having been decided on the fifth of February, 1883, and the execution issued on the eighth of the same month.

Section 1007 of the Revised Statutes provides, that in "cases where a writ of error may be a *supersedeas*, execution shall not issue until the expiration of ten days" from the render-

ing of the judgment. On the other hand, if, as contended by plaintiff's attorneys, the time begins to run from the date of the entry of final judgment, notwithstanding the pendency of a motion for a new trial and the final order, or decision of court thereon, then the execution in this case was not prematurely issued, since eighty-nine days had elapsed from the date of the entry of judgment and the issuance of execution thereon. If this be the correct interpretation of the law, this motion should be denied, since it has been repeatedly held by the supreme court, that the writ of error, to serve as a *supersedeas must* be filed with the clerk in the manner and within the time by statute provided; and that the supreme court cannot extend or enlarge that time. And this, as well under the act of 1875, relative to writs of error and appeals, as under the act of 1872, and the judiciary act of 1789. In *Kitchen* v. *Randolph*, 93 U. S. 86, decided in 1876, the court says: "We are, therefore, of the opinion, that, under the law as it now stands, the service of a writ of error, or the perfection of an appeal within sixty days, Sundays exclusive, after the *rendering* of the judgment or the *passing* of the decree complained of, is an indispensable prerequisite to a *supersedeas*, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done." (93 U. S. 86; Id. 412; 7 Wall. 574; 12 How. 387; 6 Id. 113; Phillips Sup. Court Practice, 104.)

In this case, the bill of exceptions not having been yet settled, no writ of error has been filed with the clerk, or citation issued, and no steps taken toward suing out a writ of error, other than the preparation and tender of a *supersedeas* bond, as above stated. If, then, irrespective of the pendency of a motion for a new trial, and the suspension of the judgment pending the motion, the defendant must serve and file his writ of error within sixty days from the date of entry of judgment, in order that it may serve as a *supersedeas*, the plaintiff is entitled to his execution, and to enforce his judgment, even though the defendant should prosecute his writ of error within the two years, as provided in section 1008 of the Revised Statutes.

I do not find, nor have I been referred by counsel, to any decisions of the supreme court directly covering the point involved in this motion. There are, however, numerous decisions of that court analogous to the case at bar, and which may guide us to a correct solution of the matter.

It may be proper first to refer to the sections of the Revised Statutes relative to new trials and appeals. Section 726 of the Revised Statutes, reads: "All of said [United States] courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law." This section clearly gives the defendant the right to move for a new trial. Section 987 provides the mode and manner of procedure on motion for a new trial, and stay of execution, full and ample, should the defendant wish to avail himself of it. And it further declares: "If a new trial be granted, the former judgment shall be rendered void." It may be observed that, in this case, the defendant did not proceed strictly under this section of the statute, in prosecuting his motion for a new trial. Section 1007 provides the manner in which a defendant may obtain a *supersedeas;* fixes the time within which a writ of error must be served, and security given, and provides that in "cases where a writ of error may be a *supersedeas*, execution shall not issue until the expiration of ten days."

We have seen that, in order for a defendant to avail himself of the provisions of section 1007, and obtain a *supersedeas*, he must serve and lodge his writ of error, in the manner and within the time prescribed therefor. If he fail to do so, his right to a *supersedeas* is lost, both in this and in the supreme court. A motion for a new trial, however, is not a waiver of a writ of error. This is held in 6 How. 284, where the court says: "The motion for a new trial was not a waiver of a writ of error. In some of the circuits there is a rule to this effect. But effect could be given to that rule, only by requiring a party to waive on the record a writ of error before his motion is heard. In the greater part of the circuits no such rule exists."

No such rule obtains in this circuit. Rule 29 of this cir-

cuit is as follows: "A motion for a new trial shall *not* be deemed a waiver of any bill of exceptions taken; but a writ of error or appeal taken, pending a motion for a new trial, or application for rehearing, shall be deemed a waiver of such motion or application."

The first clause of this rule negatives the idea that a motion for a new trial is a waiver of a writ of error, since it saves the "bill of exceptions taken," which would be of no significance were the writ of error denied. The last clause of the rule prevents the anomaly arising, of a lower court still entertaining a motion for a new trial, or a rehearing, in a case, where a writ of error, or an appeal, had removed the case and deprived the court of jurisdiction; or the still greater anomaly, should the lower court exercise jurisdiction of the motion, pending the re-examination or appeal, that a case might be before the supreme court for review, when the judgment or decree below had been wholly vacated. I have noticed this point at some length, since it was urged by plaintiff, on the argument of this motion, that a motion for a new trial waived a writ of error or appeal.

As already observed, the right to move for a new trial is conferred by statute. It is a substantial and an important right, and may not be denied to one asking therefor. And a party has a right to the decision of the court on his motion, even though he might not be able to urge the adverse ruling of the court upon his motion, as error, in case it was erroneous, before the supreme court. The ruling of the court might be in his favor and a new trial granted, and he be thereby saved the expense and delay of his writ of error or appeal, to correct that of which he felt aggrieved in the judgment or decree.

Sections 691, 692, Revised Statutes, provide for the re-examination by the supreme court, of *final* judgments and decrees of the circuit courts, or of the district courts acting as circuit courts. From these sections it will be seen that only final judgments or decrees can be reviewed by the supreme court.

Volumes have been written defining what are *final* judgments and decrees, and the definitions given have not al-

ways been clear or in harmony with each other. This is especially true of decrees in equity. It would seem that there should be little difficulty in defining what is a final judgment in an action at law, since in these cases, when a trial is concluded and a verdict rendered, the law itself determines what the judgment shall be, in any given case. The proper judgment, upon a verdict, follows as a matter of law, and is entered as of course, unless stayed by the interposition of the court. And this is the question which is decisive of this motion: Was this judgment, entered November 11, 1882, final for the purposes of review, within the meaning of the statute, pending the motion for a new trial made and entertained by the court? It may be conceded that it was final in form and character, and that it settled the issues raised by the pleadings. But was it, so long as it remained wholly subject to the control and future order of the court, final *in effect?* It might become final for all purposes by lapse of time; by the expiration of the term of court at which it was rendered, no order having been made by the court continuing its power over it; or by the failure of the defendant to avail himself of his writ of error within the time limited therefor. But in this case, where the defendant, within the proper time, filed his notice of motion for a new trial, which motion the court entertained, and stayed execution upon the judgment pending the motion, can it be said that the judgment, so suspended, and liable to be vacated, was final? While thus suspended, the judgment had no force or vitality, beyond the fact that, by law, it became a lien upon the realty of the defendant within the district from date of entry and docketing. It is difficult to conceive of a judgment as final and conclusive, for all purposes, when we concede that it is subject to be vacated, set at naught, and the controversy opened for readjudication.

While I find no decisions of the supreme court touching the point as to when a judgment becomes final for the purposes of review, pending a motion for a new trial, yet there are numerous decisions of that court, in reference to decrees in equity, and when they become final, where motions or petitions have been filed, and entertained, for opening or

modifying those decrees. In *Brockett* v. *Brockett*, 2 How. 240, the court decided that where a motion was made to open a decree for certain purposes, and entertained by the court, that the decree was suspended, pending the decision of the court upon the motion; that the decree, though final, did not take effect until the decision of the court upon the motion, and that the time within which an appeal must be taken commenced from the date of the order of the court upon the motion, and not from the passing of the final decree. In this case the decree was not in any manner modified, the motion therefor having been denied.

This decision was rendered in 1844, and has been repeatedly affirmed in subsequent cases. In 14 How. 1, the court, referring to this decision in 2 How. 240, says: "In that case, before any appeal was taken, a petition was filed to open the decree for certain purposes, and the court referred it to a commissioner to examine and report on the matters stated in the petition. Upon his report the court refused to open the decree, and the party, thereupon, appealed from this refusal, as well as the original decree, and gave bond with sufficient security to prosecute the appeal. The bond was given within ten days after the refusal of the motion, but was more than a month after the original decree. And the court held that this appeal was well taken: not because an appeal will lie from the refusal of a motion to open a decree and grant a rehearing, but because the court regarded the original decree as suspended, by the action of the court on the motion, and that it was not effectual and final until the motion was overruled." (At that time parties were limited to ten, instead of sixty days, as now prevails, within which to perfect appeals, etc.)

In *Railroad Co.* v. *Bradleys*, 7 Wall. 575, this same question as to when a final decree becomes such for the purposes of an appeal, is discussed. In that case final decree was rendered February 6, 1869. Between that date and the fifteenth of the same month various motions were made in reference to the decree, by different parties interested therein. The court says: "We do not think it necessary to consider the effect of either of these proceedings, for, on

the sixth of March, and, as we understand, during the term at which the decree was rendered, a motion to rescind was made, in behalf of the complainants, and was heard and decided. There is no doubt that during the term the decree was, at all times, subject to be rescinded or modified, upon motion, and could not therefore be regarded as absolutely final until the end of the term. It became final, in this case, when the motion to rescind had been heard and denied. This took place on the thirteenth of March, and, on the twentieth an appeal was prayed in open court, and on the twenty-third the bond of appeal was approved and filed. We think this was in time, and the motion for *supersedeas* must be allowed."

It is contended by plaintiff's counsel that there is an essential difference in the rule as to when a judgment at law, and a decree in equity, become final for the purposes of review, where a motion for a new trial has been made in the one case, or a petition or motion for a rehearing or modification of the decree in the other. If there is such difference, I regret that it was not more clearly demonstrated, upon the argument of this motion, and that I am unable to distinguish that difference. I perceive no reason why any distinction should or can be made. If a motion to modify, or rescind a decree, suspends that decree until the decision of that motion, and the decree becomes "effectual and final" only from the date of such decision, it is difficult to see why the same rule shall not obtain in judgments at law, where a motion for a new trial has been made and entertained by the court. The reasons that apply in the one case have equal force in the other. In each the defendant seeks to relieve himself from the effect of a decree or judgment, at which he feels aggrieved.

The power of a court over a decree is no greater than is that power over a judgment. Either may, in proper cases, be wholly vacated and set aside. It would seem an inconsistent, unequal, administration of justice which should give to a party appealing from a decree, a more liberal rule, a longer time within which to effect his appeal, and save all

of his rights thereunder, than is given to a party in an action at law, seeking virtually the same relief, by his writ of error.

Section 1012 of the Revised Statutes, provides that "appeals from circuit courts * * * shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law cases of writs of error."

Now the supreme court has given us the rule which shall prevail in reference to when decrees shall become "effectual and final," for the purposes of an appeal. Giving then, section 1012, Revised Statutes, effect, we are forced to the conclusion that in judgments at law, where a motion has been duly made for a new trial, and entertained by the court, the judgment is suspended, for the purposes of a writ of error, pending the decision upon the motion, and that it does not become effectual and final, for the purposes of review until the motion is overruled. This must be so if "the same rules, regulations, and restrictions" are to apply to appeals and to writs of error. (14 How. 1; 7 Wall. 578.) It follows, therefore, in this case, that the judgment entered November 11, 1882, did not become "effectual and final" for the purposes of review, until the fifth of February, 1883, when the motion for a new trial was denied. This being so, the defendant may serve and lodge his writ of error, serve his citation and give the security within sixty days, Sundays exclusive, from February 5, 1883. And, as in this case, the writ of error may be a *supersedeas*, execution should not have issued upon the judgment for ten days from February 5, 1883. Having been issued on the eighth of February it was therefore prematurely issued, and should be recalled.

In 1 Fed. Rep. 456, in the eighth circuit, McCrary, J., it is distinctly held that "a writ of error will operate as a *supersedeas* if duly served within sixty days, Sundays exclusive, after a motion for a new trial has been overruled." 6 Blatchf. 523, seems also to be in point, though the case is somewhat obscurely reported. (See also *Telegraph Co.* v. *Eyser*, 19 Wall. 419, 428, as to a liberal rather than narrow

construction of the act of Congress of June 1, 1872, in reference to appeals.)

A correct decision upon the points involved in this motion is very important to the parties interested in this case; it is not less important as establishing a rule of practice in similar cases where motions for new trials have been made and denied.

The motion of defendant is granted.

GEORGE W. TRAVER ET AL. *v.* GEORGE F. TRIBOU. SAME *v.* AMASA BROOKS ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.
FEBRUARY 12, 1883.

1. DIVISION OF DONATION BETWEEN SETTLER AND WIFE.—The division of a donation to a married man under section 4 of the donation act of September 27, 1850 (9 Stat. 497), between the settler and his wife, is committed by the act to the discretion of the surveyor general, and in contemplation of law is made when the settler proves, to the satisfaction of said officer, that he has complied with the provisions of the act, and the latter issues the certificate containing the facts constituting such compliance, and specifying the portion of the donation set apart to the husband and that to the wife, as provided in section 7 of said act; and no valid objection thereto is found by the commissioner of the general land office, which is shown by the subsequent issue of a patent thereon.
2. SUIT FOR PARTITION—STATUTE OF LIMITATIONS.—The wife of a married settler under section 4 of the Donation act, died after final proof by the settler of compliance with the act and before the issue of the patent; *Held*, 1. That the half of the donation to which she was or would have been entitled, was thereupon granted, by the act, to her surviving husband and children in equal parts as the direct donees of the United States; and, 2. The statute of limitations did not commence to run against the right of the heirs of said husband to maintain a suit against his vendees of certain distinct portions thereof, for a partition of their interests in said half of said donation, until the same was formally and finally divided by the surveyor general as aforesaid.

Before DEADY, District Judge.

George H. Durham and H. Y. Thompson, for plaintiff.

W. F. Trimble and Benton Killen, for defendants.

DEADY, J. These cases were both heard and submitted on the plea of the statute of limitations to the bill, and will be considered together. The plaintiffs, George W. Traver and Emma S., his wife, are citizens of the state of California, and George A. Graham and Ida M., his wife, are citizens of the state of Ohio. They bring these suits for the partition of lots 5 and 6, in block 254, of the city of Portland.

The bills were filed on October 16, 1879, and allege that the defendant George F. Tribou is the owner of an undivided one fifth of the west half of said lots, and the defendants Amasa Brooks, John E. Brooks, and Julia A. Brooks, are the owners of a similar fifth of the east half thereof, and that the plaintiffs, George W. and Emma S. Traver and Ida M. Graham, are the owners of the remaining four fifths of both lots in the following proportions: the first, of the undivided eighty-two one hundred twenty-fifths, and the last two, of nine one hundred twenty-fifths each. The pleas allege that the defendants, and those under whom they claim, have been in the open, actual, and adverse possession of their respective portions of the premises, as the exclusive owners thereof, for more than twenty years before the commencement of these suits. The pleas are accompanied by answers.

Disregarding the averments of the pleadings which are mere conclusions of law, the admitted and material facts of the case, as they appear therefrom, are these:

On June 25, 1850, Daniel H. Lownsdale, Stephen Coffin, and W. W. Chapman, were in the joint occupation of that portion of the public domain upon which the city of Portland was then partially laid out and has since been built, without any other right thereto than the possession under the laws of the provisional government, when Lownsdale released and quitclaimed to Chapman certain blocks or parcels therein, including block 254, with a covenant of warranty against all persons, the United States excepted, and another, that if Lownsdale should thereafter acquire title to the premises from the United States, he would convey the same to Chapman; and the defendants, and those under

whom they claim, have occupied said lots as the owners thereof, under said deed to Chapman and successive conveyances thereunder, ever since.

On July 6, 1850, Lownsdale married Nancy Gillihan, a widow, with two children, namely, William T. and Isabella E. Gillihan. On March 11, 1852, Lownsdale filed his notification in the office of the surveyor general, upon a certain portion of said public domain, including block 254, as a settler thereon, under the act of September 27, 1850 (9 Stat. 497), commonly called the Donation act; and on April 8, 1852, he filed in said office his own affidavit and those of two witnesses, showing his marriage to Nancy, as aforesaid; that he was a qualified settler under said Donation act, and that the settlement and cultivation of the premises required by the act was commenced by him on September 22, 1848, and continued to that date; whereupon, as it is averred in the pleas, the surveyor general set apart the east half of said tract to Lownsdale, and the west half, including block 254, to his wife Nancy; and that on September 29, 1853, Lownsdale made his final proof to the satisfaction of the surveyor general, of four years' residence on, and cultivation of the land described in his notification, and of his compliance with the Donation act, so as to entitle him and his wife Nancy to a patent therefor.

On April 15, 1854, Nancy died, leaving her husband and four children, namely, Millard O. and Ruth A. Lownsdale, and William T. and Isabella E. Gillihan, aforesaid; and on January 17, 1860, Lownsdale purchased the interest of said Isabella E. in the donation of her mother, and on February 14, 1860, conveyed an undivided two fifths of the same to Hannah M. Smith. On October 17, 1860, a patent certificate was duly issued for the donation, wherein the east half thereof was designated as the part inuring to Lownsdale, and the west half as the part inuring to his wife, Nancy. On May 4, 1862, Lownsdale died, leaving James P. O. and Mary, his children by a former wife, and the plaintiff, Emma S. Traver, and Ida M. Squires, the children of Sarah Squires, a deceased daughter by said former wife, and Millard O. and Ruth A., his children by Nancy; and on June

6, 1865, a patent was issued by the United States for the donation to the heirs of Lownsdale and his wife—the east half to the heirs of the former, and the west half to those of the latter.

On April 28, 1864, William T. Gillihan brought a suit in the state circuit court for the partition of the west half of the donation, in which the other children of Nancy, and the heirs of Lownsdale, together with many other persons claiming divers blocks and lots therein as the vendees of Lownsdale, were made defendants, including W. W. Chapman, the defendant Tribou and the immediate grantor of the defendant, Amasa Brooks, from whom his co-defendants, John E. and Julia A. Brooks, have long since—November 22, 1877—derived whatever interest they have or claim in the premises; that, on May 22, 1865, said court decided that Lownsdale, as the survivor of Nancy and the grantee of her child, Isabella E., was the owner, in his life-time, of an undivided two fifths of the west half of said donation, and that said William T., Millard O., and Ruth A., as the children of Nancy, were then each the owners of an undivided one fifth of said half; that, on August 12, 1865, said court set apart and allotted to said three children, in severalty, certain portions thereof, and the remainder to the heirs, vendees, or claimants under Lownsdale, according to their respective interests, without determining what they were; and because said partition was unequal, it was further adjudged that the children of Nancy should be paid the sum of thirty-nine thousand one hundred and fifty-six dollars and two cents to be apportioned among the several parcels of land set apart to the heirs, vendees, or claimants under Lownsdale, and to be a lien thereon; that three hundred and fifty-five dollars and ninety cents of said sum was so apportioned upon said lots 5 and 6, and that thereafter the defendant Tribou and Amasa Brooks paid said owelty.

On February 23, 1869, James P. O. purchased the undivided two fifths of one fifth of the west half of the donation, from Hannah M. Smith, they being a portion of the same fifth she had purchased from Lownsdale in his life-time; and afterwards and before the commencement of these suits,

all the heirs of Lownsdale, except the plaintiffs, Emma S. and Ida M., conveyed their interests in the premises to the plaintiff, George W. Traver.

Since September 29, 1849, under the laws of Oregon, an adverse possession of twenty years was sufficient to bar an action by the owner for the possession, until the passage of the act of October 17, 1878 (Ses. L. 21), which limited the time to ten years; but in all cases where a cause of action had then accrued, and this period had expired or would expire within one year from the passage of the act, an action might be brought within such year.

These suits were brought on the last day of the year following the passage of the act of October 17, 1878, and if they were not barred by lapse of time at the date of such passage—if twenty years had not then elapsed since the plaintiff's right of suit accrued—it is admitted they were brought within the time allowed by law.

But upon the letter of the statute it appears that even if the right of suit was barred at the date of its passage, it was thereby revived and extended one year therefrom. But I do not understand that the plaintiffs rest their right to sue upon this ground, and the cases will therefore be considered upon the assumption that if, on October 17, 1878, the period of twenty years had elapsed from the time the right of suit accrued the suits are barred.

In the consideration of purely equitable rights and titles, a court of equity is not governed by the statute of limitations. But these suits are brought upon the legal title of the plaintiffs, and in the determination of them, the limitation applicable to an action at law thereon will be followed. (*Hall* v. *Russel*, 3 Saw. 514; *Manning* v. *Hayden*, 5 Id. 379.)

When, then, did the plaintiff's right of suit accrue, and when did the statute of limitations commence to run against it? Manifestly the cause of suit must have accrued whenever the plaintiffs or those under whom they claim were entitled to the possession of the premises and to maintain a suit for partition against any person who owned an undivided interest therein; and under the facts as to the possession of the defendants and those under whom they claim,

the statute commenced to run against such right as soon as it accrued.

The plaintiffs contend that the right of suit accrued upon the giving of the decree in the partition suit in 1865, under which they claim to derive title—that the legal operation of the partition was to effect an exchange of distinct parcels of land between the heirs of Lownsdale and the children of Nancy, and that the former took as purchasers from said children, and not by descent from their ancestor, and, therefore, the statute of limitations had not run on October 17, 1878. At most the heirs of Lownsdale could only have received three fifths of block 254 from the children of Nancy by this exchange, for that was all they ever had in it.

But I am still satisfied with the ruling upon this point in *Field* v. *Squires*, 1 Deady, 391. In that case I held that this partition divided the land between the children of Nancy on the one hand and the heirs and vendees of Lownsdale on the other, according to the respective interests of the latter, without attempting to determine what they were, giving to the children in land and owelty what was deemed the equivalent of three fifths of the premises, and to the heirs and vendees in land charged with the payment of this owelty what was deemed equivalent to two fifths of the same. To the same effect, see *Davenport* v. *Lamb*, 13 Wall, 428. The portions or parcels then ascertained and set apart in severalty to the children of Nancy were in contemplation of law the very three fifths which they took from the United States under the donation act after the death of their mother, and in like contemplation the remaining two fifths were the very portion of the premises which the heirs of Lownsdale inherited from him, subject, however, to the legal effect of the acts done and suffered by him concerning the same.

Nor was the character or origin of the estate or title of these parties changed or affected by this decree and partition. The heirs of Lownsdale took the two fifth tract by descent from him, as his heirs, and as such were and are so far bound by his acts and conduct relating to the same, as he would be himself, if living. This was not

an exchange of distinct parcels of land owned in entirety by either party, but a separation of undivided interests in a tract theretofore owned by them in common.

The plaintiffs also contend that their right to the possession and to maintain this suit for partition did not accrue until the half of the donation inuring to the wife was finally designated in and by the patent issued on June 6, 1865—a little over fourteen years before the commencement of these suits. On the contrary, the defendants insist that the right of possession accrued to the plaintiffs or those under whom they claim on April 8, 1852, when Lownsdale made the proof, under section 7 of the Donation act, of the commencement of his residence and cultivation, because, as they allege, the surveyor general then divided the donation between the husband and the wife, as required by section 4 of said act, and thereupon the statute of limitations commenced to run against the wife in favor of the defendants' grantors then in the adverse possession of block 254.

The plea and argument of the defendants assume that the children and survivor of Nancy took the west half of the donation as her heirs, and are therefore in privity with her and bound by her acts or conduct while living, and the wife of the settler, Lownsdale. But the law, so far as this court is concerned, is held otherwise. Upon the death of Nancy, her "share or interest" in the donation was given, by section 4 of the act, to her husband and children in equal parts, and they took it under the Donation act as the direct donees of the United States, and not as the heirs of Nancy, whose interest in the premises, whatever it was, terminated with her death. (*Fields* v. *Squires*, 1 Deady, 382.)

But even if they took as the heirs of Nancy, or in any sense by, through, or under her, the result, so far as this plea is concerned, must be the same. She was a married woman when the Donation act passed, and continued to be one up to the time of her death. All the statutes of limitation ever in force in Oregon, from that contained in the "Steamboat act" of September 29, 1849, and taken from the revised statutes of Iowa (p. 384) of 1843, down to the present one, have provided that the statute should not com-

mence to run against a married woman during her marriage. It may then be taken for granted that whether Nancy's husband and children took the western half of the donation as the direct donees of the United States, or as her successors in interest, or that whatever possession those under whom the defendants claim may have had of this property before the death of Nancy, the statute of limitations did not commence to run in their favor before the death of Nancy—April 15, 1854. Did it commence to run then, and if not, when?

On September 29, 1853, the settler Lownsdale made his final proof of the residence and cultivation required by the act, and had otherwise conformed thereto, so that according to the construction given to the Donation act by the supreme court in *Hall* v. *Russell*, 101 U. S. 510, as soon thereafter as it was ascertained by the proper authority that this proof was sufficient, he became a qualified grantee thereunder, and the right to the one half of the donation was then vested in him. And for the same reason, Nancy also became a grantee and entitled to one half of the donation, provided she did not die before the patent issued. But she did so die, and thereupon her husband and children became entitled in her place to one half of the donation. But to what half? and was there yet any division of the donation or official designation of the half inuring to the settler and the one to the wife?

The defendants allege in their pleas, that this designation was made by the surveyor general on April 3, 1852, when Lownsdale made his preliminary proof or proof of settlement. But, however this may be as a matter of fact, as a matter of law I do not think the division could be formally and finally made before the full compliance with the act by the settler, and proof thereof to the satisfaction of the surveyor general, as provided in section 7 of the act. Until this was done, the settler had only a possessory right in the land—the right of occupation—and there was no grant or donation to divide between him and his wife. (*Hall* v. *Russell*, *supra*.) And any entry or action by the surveyor general on the subject at this time, must, in the nature of things, have been merely provisional, and subject to cor-

rection and modification in his final action upon the case, when he came to consider the final proofs and make up and issue the patent certificate.

Upon the final proof being made, if it was satisfactory, the surveyor general was authorized to issue a certificate under rules and regulations to be prescribed by the general land office, "setting forth the facts in the case and specifying the land to which the parties are entitled."

It is understood to have been the practice of the land office to make this division of the donation upon the issue of the certificates and then enter the same on the records or plats of the survey in the office or *vice versa*. It is also understood that the commissioner of the general land office has, in some cases, exercised the right to alter the division, but probably only with the consent of the parties interested. And upon the assumption that the commissioner was authorized in all cases to review and modify the division made in the local land office, the plaintiffs base their claim that there was no absolute and final division of the donation until the patent was issued.

But I doubt if the commissioner is authorized to set aside the division made by the surveyor general and substitute one made by himself. The authority given him by the act is to issue a patent according to the facts stated in the certificate, one of which is, in case the settler is a married man, the division of the donation between him and his wife and the designation of the part inuring to each. True, if there is a valid objection to the issue of a patent upon the case made in the certificate he may refuse to do so. But I think his power is then exhausted, and he must return the certificate to the local office for further proceedings in accordance with his decision.

At least the power to partition the donation between the settler and his wife seems committed to the judgment of the surveyor general, and although he may be required by the direction of the commissioner to exercise this power in a particular case, and to correct errors committed in the exercise of it, as that the donation was not divided into two equal parts, I do not think he could be required to divide

it in a particular manner, as by an east and west line rather than a north and south one, or to assign the north or east half to the wife rather than the south or west one. So far as the partition and allotment of the donation between the settler and his wife rests in the discretion of this officer, I think the act commits the matter wholly to his judgment.

Assuming as I do, and as seems to be admitted by the defendants' plea, that a suit for partition could not have been maintained by the plaintiffs' ancestor, Lownsdale, against the defendants for partition of the premises until by the formal division of the donation, it was ascertained and determined in which half of the same they would be included, it follows that the statute of limitations did not commence to run against this suit until such division was made. When, then, for the purposes of this case, was this division made? On September 29, 1853, when the settler made his final proof and the matter was submitted to the surveyor general for examination and determination, or on October 17, 1860, the date of the certificate in and by which the division, so far as appears, is first formally made and announced? In the one case the limitation of twenty years, counting from the filing of the proof, or the death of Nancy on April 15, 1854, had elapsed before the passage of the act of October 17, 1878, and the plaintiffs' right of suit was then barred, and in the other, the limitation would not have expired until October 17, 1880, and therefore the right of suit was not barred at the passage of said act.

Taking the facts as stated, and the construction of the Donation act as announced by Mr. Chief Justice Waite, in *Hall* v. *Russell, supra*, my conclusion is, that the share or interest of Nancy, in this donation, was not ascertained or set apart during her life-time, nor until the patent certificate was issued on October 17, 1860, when and whereby the division was made, giving the settler the east half, and the west half to the wife, nominally, but in effect to those whom the act gave it upon her death; and upon this certificate, and in accordance therewith, the patent subsequently issued.

The right to the patent, as was said by Mr. Justice Field,

in *Stark* v. *Starrs* (6 Wall. 413), became perfect when the certificate of the surveyor general was received by the commissioner of the general land-office, and he found no valid objection thereto, and that none was so found is shown by the subsequent issue of the patent thereon. (*Barney* v. *Dolph*, 97 U. S. 656.) In the division of the donation it appears that the west half was set apart to Nancy, although she was then dead; but such division being the basis of the patent would, I suppose, by analogy, inure, under the act of May 20, 1836 (5 Stat. 31), to the benefit of the persons to whom the act gave the land in such contingency. (See *Stark* v. *Starrs*, *supra*, 427.)

Upon the argument, counsel for the defendants also insisted that these suits could not be maintained, because the plaintiffs were not in the actual possession of the premises, and suggested that the suits ought to be stayed at least until the plaintiffs tried their right to the possession by an action at law. It is not apparent how this question can arise on the consideration of these pleas of the statute of limitations. But if it can, the answer is very plain.

And first, the pleas admit in effect that the title to two fifths of the western half of the donation was in Lownsdale—one fifth as the donee of the United States upon the death of Nancy, and the other fifth as the grantee of her daughter, Isabella E.; that by the partition of the tract in 1865, the whole of block 254 was set apart to the heirs of Lownsdale, subject to the effect of his deed of quitclaim to Chapman of June 25, 1850. And as to that, it was held in *Fields* v. *Squires*, 1 Deady, 379, that this deed only passed the bare possession, the title being still in the United States, but that by virtue of the covenant therein, for further assurance, in case Lownsdale obtained title from the United States, his heirs were estopped to claim against the grantee in said deed or those claiming under him, the one fifth interest therein which he took from the United States on the death of Nancy, but as to the fifth purchased from Isabella E., he was not so estopped; and that Lownsdale's grantee in the deed of June 25, 1850, nor those claiming under him, neither lost nor gained by the partition, and

that consequently the defendants' interest in the premises is an undivided one fifth. (See *Davenport* v. *Lamb*, 13 Wall. 429.)

From this it is plain that the legal title to the undivided four fifths of these premises is in the plaintiffs, and that they are entitled to maintain these suits for partition, unless they are barred by lapse of time. As was said by this court, in *Lamb* v. *Starr*, 1 Deady, 364, "The jurisdiction of a court of equity over a suit for partition, so far as I have been able to ascertain, never did depend upon the possession by the complainant. Where the title of the complainant, whether it be legal or equitable, is not doubtful or suspicious, equity will take jurisdiction and decree partition, without reference to the question of possession. But in the case of an alleged legal title, when either of these objections appear, it is usual, first to send the complainant to a court of law to try his title, and in the mean time retain the bill to await the result. In the case of an equitable title, the court of equity first ascertains the title, and if found for the complainant, proceeds to make partition." (*Wilken* v. *Wilkin*, 1 Johns. Ch. 117; *Cox* v. *Smith*, 4 Id. 276; *Matthewson* v. *Johnson*, Hoff. Ch. 562; 4 Kent's Com. 364; *Phelps* v. *Green*, 3 Johns. Ch. 304.)

In this case the title is neither doubtful nor suspicious. The facts constituting the plaintiffs' right are admitted, as are also the facts which it is claimed constitute an adverse possession sufficient in duration to bar the assertion of such right and in effect to constitute a title in the defendants.

The only question to be determined, when did the statute commence to run? is one of law, and may as well be decided in a court of equity as in a court of law, for in either case the court must decide it. On the contrary, if the question was one of fact, as for instance the duration or character of the defendants' possession, and there appeared to be any doubt about it on the evidence, the plaintiffs might very properly be directed to try that question in a court of law with a jury. But there can be no good reason for sending a plaintiff in a suit in equity for partition, to a court of law, to try a mere question of law involved in his claim, or

the defence thereto—particularly in modern times when the two courts are composed of the same judges and the former rivalry and jealousy between them has become a thing of the past.

The adverse possession of the defendants not having continued twenty years after the statute of limitations commenced to run against the plaintiffs or their ancestors, and before these suits were commenced, the pleas to the bills are considered insufficient, and therefore overruled.

CALIFORNIA DRY DOCK COMPANY *v.* R. L. ARMSTRONG ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
FEBRUARY 12, 1883.

1. GENERAL RULE OF DAMAGES.—The general rule is, that no damages can be recovered until they shall have actually accrued; and that an action can not be maintained on a mere liability to a third party to which a plaintiff has been subjected by the act of the defendant. The plaintiff, in such a case, must allege and prove, that he has incurred actual damage by showing the payment, or other satisfaction of such liability.
2. LIABILITY OF STRANGER COMMITTING WASTE.—A stranger committing waste upon premises leased, or held by a particular estate, is liable to the tenant for the injury to the possession, and to the landlord, or reversioner, for the injury to the freehold, or inheritance. The right of each is distinct from that of the other, and satisfaction made to the one, is no bar to an action brought by the other.
3. LIABILITY OF TENANT FOR WASTE AND HIS RIGHTS AGAINST TRESPASSER. The tenant is answerable to the landlord, or reversioner, for waste done by a stranger. He has his remedy over against the stranger, but the tenant's recovery against the stranger for injuries to the freehold, or reversion, is dependent on his first having satisfied the landlord's claim by payment, or repair of the injured premises; and, in such case, the stranger is liable, only, for the payment, or expense, necessarily incurred.—*Wood* v. *Griffin*, 46 N. H. 231, approved and followed.
4. EFFECT OF EXPRESS UPON IMPLIED COVENANTS IN A LEASE.—Where the parties to a lease of real property have, expressly, covenanted to repair, it seems, that the express covenant takes the place of the implied covenant, and becomes the measure of the tenant's liability.
5. RIGHT OF TENANT AGAINST TRESPASSER WHERE TENANT HAS COVENANTED TO REPAIR.—It being admitted that in a case, in which the tenant

has expressly covenanted to repair, such tenant has a right to maintain an action against a stranger committing waste, for injuries done to the freehold: *Held*, that such right of action does not accrue in favor of a tenant, until he has paid, or satisfied, his landlord, or repaired the premises.

6. COMPLAINT FAILING TO STATE SATISFACTION OR REPAIRS MADE, IS DEMURRABLE.—A complaint setting forth the fact of a lease containing a covenant by the tenant to repair, and an injury to the freehold by a trespasser (defendant in the action) and further alleging, that, by reason of the tortious act of the trespasser, the tenant (plaintiff in the action) has become, and is, absolutely liable, and indebted to the landlord for the damages resulting from the trespass, viz. the necessary cost of repair, but, which fails to aver, that the landlord's claim has been satisfied, or that any expenditures in repair have been made by the tenant, does not state facts sufficient to constitute a cause of action.

Before SAWYER, Circuit Judge.

Wallace, Greathouse & Blanding, for plaintiff.

Andros & Page, for defendant.

SAWYER, Circuit Judge. The plaintiff alleges in the first count, that it was the lessee for a term of years of certain real estate, partly covered with water, upon which there was situated a marine railway extending into the water; that during the term of said lease, and while the plaintiff was in the possession of the premises under the lease, the ship *Alneburgh*, of which the defendants were, at the time, owners, negligently ran upon, and came into collision with said marine railway, and broke down and destroyed it; that by the terms of said lease, "it was expressly covenanted and agreed by and between plaintiff, as lessee and the lessors," that plaintiff would at the expiration of the term of said lease, to wit: on the tenth day of November, 1880, quit and surrender said premises, and every portion thereof, to the said lessors in as good state and condition, as reasonable use and wear thereof would permit, (damages by the elements excepted) and that plaintiff under and by virtue of said agreement and covenant contained in said lease, became and was, on said ninth day of November, 1879, and ever since, continuously, has been, and now is, absolutely liable and indebted to the said lessors for the whole value of said

marine railway, so constructed upon said premises, at the commencement of said lease; and for the whole amount of the damages resulting from the breaking down, and the destruction of the same as aforesaid, being the necessary cost and expenses of putting the said marine railways in as good state and condition, as they were in on the said thirteenth day of November, 1875, reasonable use and wear thereof excepted; that the necessary cost of putting said marine railway in such repair as is required by the plaintiff's said covenant would be twelve thousand dollars, and that plaintiff has, thereby, been damaged, and injured, to said amount for which sum judgment is asked.

There is another count for injuries to the plaintiff's possession, not embracing the damages to the inheritance. Defendant demurs to the first count, on the ground, that it does not appear, that plaintiff has made the repairs, or made satisfaction to the lessors, under his covenant, for the damages to the freehold; that a mere liability to repair without first satisfying the liability, gives no ground of action for an inquiry to the reversionary estate of the lessors; that he is not injured, and sustains no real damages till he actually repairs, or makes satisfaction; that as he may never perform this covenant, the injury and damages may never arise; and that there is no right of action till actual damage and injury arise. There are two estates injured here: the temporary estate of the lessee, continuing during his term, and the permanent estate of the lessors, the inheritance—an injury to the possession and an injury to the land itself—and the owner of each estate has his action against the stranger, who commits the wrong or waste; each for the particular injury done to his particular estate. Under the common law, the action for the injury done to the lessee's estate would have been trespass, and that to the lessor's case. (2 Washb. on Real Prop. 393; Taylor's Land. and Ten., sec. 173; *Starr* v. *Jackson*, 11 Mass. 521.) Chamber, J., in *Attersoll* v. *Stevens*, 1 Taunt. 194, says: "Where different persons have distinct rights in the subject of a trespass, the compensation must be to each in proportion to the injury received. One of them cannot claim that part of the com-

pensation which belongs to the other; *nor can the satisfaction made to one be a bar to an action brought by the other.* It can hardly be necessary to cite cases on this point."

If the tenant is entitled to recover for injury to the estate of the reversioner, it is on the ground of his liability to the landlord to repair. It is admitted, that the tenant is entitled to recover in such case, when he is under obligation to repair, provided he has in fact repaired, or made satisfaction to the landlord; and the question now is, whether, although liable, he can recover before he has repaired, or made satisfaction? Strange as it may seem, counsel have been able to find but one case in which this exact point has arisen, and been decided; and that is *Wood* v. *Griffin*, 46 N. H. 231. This case bears abundant evidence of having been most thoroughly, and, carefully, considered; and the reasoning appears to me to be unanswerable. It presented the precise question which was fully considered and determined; and the judgment was reversed on that point alone. The action was trespass, brought by the tenant for life for waste, committed by felling and carrying away timber trees. I cannot do better than quote some passages from the decision. Says the court: "The question is, whether the plaintiffs are entitled to include, in their damages, the full value of the wood and timber, upon the ground that they are liable over to the remainder-man or reversioner; or whether they are limited to damages for the injury to their possessory interest."

"There can be no controversy, that the cutting of the wood and timber, by a tenant for life, or a stranger, for the purposes indicated in the case, is waste. (*Miles* v. *Miles*, 32 N. H. 147; *Dennett* v. *Dennett*, 43 Id. 499.) And it seems to be equally clear, that the tenants are liable to the person having the immediate remainder, or reversion for such waste, whether committed by themselves, or a stranger, or by a part of such tenants only. (4 Kent's Com. 77, 85; *Cook* v. *Chaplain Trans. Co.*, 1 Denio, 104; *Attersoll* v. *Stevens*, 1 Taunt. 200; Com. Dig. 517, tit. Waste, ch. 4; Cruise's Dig., tit. 18, ch. 1, secs. 63, 20, and 54; Wash. on Real. Prop., 116.)" * * *

"It may be considered as established, that, while the tenant is answerable to the remainder-man, or reversioner, for waste done by a stranger, such stranger is liable over to the tenant." (4 Kent's Com. 77, 85; 2 Saund. 259; and cases cited.)

"The precise question, then, is, whether in an action of trespass *quare clausum fregit* by the tenant against a stranger, he can recover damages for the injury to his possession, and, also, for the injury to the inheritance, without there having been any recovery against him by the remainder-man, or reversioner, or any satisfaction made by him in any form." * * *

"It is clear from the adjudged cases, that the claims of the tenant and reversioner can be separated; that they are in fact distinct, and that each may maintain a suit for the injury done to him; and that both may be pending at the same time. How, then, can the tenant include in his damages the injury to the reversion? If he can in any case, how is the defendant to avail himself of the fact that another action is pending by him in remainder, or reversion?"

"Again, there is no necessity for arming the tenant with such power. If he is entitled to recover for the injury to the inheritance, whether he has satisfied the reversioner or not, his recovery must be a bar to a suit by the landlord; and still the trespasser might avail himself, by way of defence, of a license, or admission, by the tenant, which might, in effect, defeat the landlord's claim against such trespasser; and besides, the landlord might find his claim against the trespasser defeated by the result of a suit prosecuted without his assent, in a manner opposed to his wishes, or by his *inability to obtain from the tenant himself the fruits of the suit against such third person.*"

"The fact, that the tenant is answerable for the injury, does not, we think, furnish an adequate reason for sanctioning such doctrines. Where waste is committed by cutting down timber trees by a stranger, the property in them at once passes to the landlord; and he may take them, or maintain trover for them; and there, surely, can be no pro-

priety in holding that the tenant, also, could have the same remedy, *for he has no property whatever in them.*"

"*If the tenant has been compelled to satisfy the landlord for the injury by a third person, he may have his remedy over, but, until then, we think he must be confined to damages for the injury to the possession.*"

After distinguishing cases of personal property in the hands of others than the owner, the court says: "But beyond this, *the authorities*, so far as we have any, *are opposed to the claim of the tenant to recover damages for an injury to the inheritance, until he has first satisfied the landlord*; and there is nothing in the state of the law in respect to suits by agents, carriers, and others in possession of goods, that would induce us to extend it to a case like the present. We think, therefore, that *on this ground the verdict must be set aside, unless* plaintiff will reduce the amount of the verdict to nominal damages."

In my judgment, also, the tenant cannot recover before repairing, or satisfying the landlord, for the reason that, till then, his cause of action on this ground has not matured. He has sustained no injury till he has done something by way of repairs, or towards satisfying the landlord for the injury to the inheritance. He may never do either, and he, certainly, ought not to recover unless he does one, or the other. A recovery by an irresponsible tenant may wholly defeat the remedy of the landlord. The tenant ought not to recover any more than he pays in satisfaction, or necessarily expends in repairs, and if he has in fact repaired, or made satisfaction, he cannot recover more. Should he be unnecessarily extravagant in either, he might recover less. He may compromise at one half, or one fourth the amount claimed. The extent of the liability should, in some mode, be fixed before he is permitted to maintain a suit. Generally, in the law, relating to other matters, where a cause of action arises out of a liability incurred by reason of one's relation to another, the action cannot be maintained until payment, or satisfaction, of the liability; and I can perceive no good reasons for making a distinction in favor of the tenant in a case of this kind. Thus in *Willson* v. *McEvoy*,

25 Cal. 169, it was held in an action for the breach of an injunction bond, that an attorney's fee for which plaintiff became liable in resisting the injunction, could not be recovered without having been first paid by the plaintiff. The court observes: "The rule of the common law was, that on a bond to indemnify against the damage the obligee might sustain, he could recover, only, upon evidence that he had sustained actual damage; that compensation would only be awarded for actual loss. Evidence showing that he was subject to a liability, without showing payment, was not enough," citing several authorities. This was affirmed in *Prader* v. *Grimm*, 28 Cal. 11, and extended to the expenses of procuring testimony. Also affirmed in subsequent cases. So, without actual payment of the debt, although the liability of the surety has attached, he cannot recover against the principal. (*Hayes* v. *Josephi*, 26 Cal. 543.) So, also, where an indemnity bond is given to a sheriff, to save him harmless from any damages resulting from any trespass he may commit in executing a writ of replevin or attachment, he cannot recover on the bond, notwithstanding the fact, that his liability has been *established by a judgment against him*, recovered for the damages resulting from the trespass, unless he has, also, in fact, paid the judgment so recovered. (*Lott* v. *Mitchell*, 32 Cal. 24.) In this case the condition of the bond was very broad, and should authorize a recovery, if any covenant could do so, short of providing in express terms, that a recovery may be had upon incurring the liability, before satisfaction. The condition is as follows: That the obligors "should well and truly keep and bear harmless and indemnify the said W. O. Middleton, sheriff, as aforesaid, of and from any and all damages, costs, suits, judgments, and executions, that shall or may at any time arise, come, or be brought against him, by reason of the detention of said property, or the delivery thereof to the plaintiff."

The same was held on an indemnity to the sheriff upon the levy of an attachment in *Roussin* v. *Stewart*, 33 Cal. 211–12. In *De Costa* v. *Mass. Min. Co.*, 17 Id. 616, it was held, that "the plaintiff could not recover beyond the injury sus-

tained, and it *was improper to award compensation for an expense which might never be incurred.*" This was an action for a nuisance, in digging a ditch on plaintiff's land, and the estimated cost of filling the ditch had been allowed as damages. So in *Burt* v. *Dewey*, 40 N. Y. 285, it was held that a liability established by a *judgment against a party cannot afford a ground of action until paid*, as it may never be enforced. The liability sued on in this case, rests on the express covenant to repair, set out in the complaint, and not upon the common law liability to repair, and the injury done by the negligence of the defendant. As there is an express covenant, I suppose that it is the measure of the liability, the parties having fixed the extent of the obligation on this point by the terms of the contract. At all events, that is the liability alleged in the complaint. So, also, in the several cases cited upon covenants in bonds, the injuries provided against in some of them are trespasses. Yet in *Roussin* v. *Stewart*, 33 Cal. 212, the court says: "There is nothing in the point that the indemnity is against a trespass." And the same is held in *Stark* v. *Raney*, 18 Cal. 632, where the trespass is not malicious. I see no good reason why these authorities, and numerous others of a similar character, should not be applicable to this case, as to when the right to recover damages attaches.

Whether the liability in this case to repair rests upon the express covenant set out, upon implied covenants, or upon principles of public policy, which hold the tenant responsible for a violation of duty to his landlord in failing to protect the freehold, while in his possession as tenant, in my judgment, both upon reason and authority, no recovery can be had until the tenant has made repairs, or made satisfaction to the landlord. It is argued, that if this rule be adopted, then the tenant may never be able to recover, as he may not be able to agree with his landlord as to the amount to be paid, and he may not be able, for want of means, either to repair or make satisfaction. If that be so, his damages will never accrue, and he, certainly, ought not to recover. That is the very question presented. Clearly, the general rule in all matters is, that damages cannot be recov-

ered until they have actually accrued; and I can find no possible good ground for applying a different rule to cases of this kind.

It only remains to notice the authorities relied on by the plaintiff, apparently with great confidence. No one of them, either presents, or decides, the exact point. In those relating to real estate, whatever is said bearing upon the precise point is *obiter*, thrown out in the course of the argument by the judge without being called for by the case as presented in the report. The observations in each case are general remarks, which, considered with reference to the facts before the court, are not inconsistent with the views already expressed; but are mere statements of the general rule as to the liability to the tenant. The first, and, apparently, the strongest case, is *Cook* v. *Champlain Trans. Co.* 1 Denio, 92. In this case, the question whether the tenant was entitled to recover upon his liability to repair *without* first repairing, or making satisfaction to his landlord, was not *raised by counsel, or discussed, or even alluded to by the Court.* It does not appear whether the tenant had repaired, or not. He may have done so, or have made satisfaction, probably had repaired; and as there was no question on that point, it was unnecessary to incumber the record by stating facts not necessary to illustrate the points actually made and determined. If the plaintiff had not, in fact, repaired, the case is entitled to little weight as authority, because no point was made upon it, and the distinction not being brought to the attention of the Court,—as often happens in judicial opinions—the point was assumed without considering the question. The statement by the judge, that the plaintiff, in consequence of his liability to repair, was entitled to recover the whole value of the buildings, was but the statement of the general rule upon the subject, and is correct, and as specific a statement of the rule as was called for by the points made. The general rule is stated just as specifically, and, positively, in *Wood* v. *Griffin*, 46 N. H. 238. After stating that the tenant is liable to the remainderman for waste committed by a stranger, the Court adds: "It may also, be considered as established, that while the tenant is

answerable to the remainderman, or reversioner, for *waste done by a stranger, such stranger is liable over to the tenant.*" And for these propositions the Court cites, among others, this very case of *Cook* v. *Champlain Trans. Co.* Yet the Court, subsequently, considered the precise question now in hand, and reversed the judgment on that point. It, evidently, did not consider *Cook* v. *Champlain Trans. Co.* opposed to its view in that particular, or as deciding that point, for although cited as authority upon the general rule, it was not even referred to, as bearing upon the question, whether the tenant must repair, or make satisfaction before he can recover for the waste, or injury to the freehold. There is another ground upon which the plaintiff was entitled to recover in that case. He was actually the owner of the buildings and machinery destroyed—of the machinery *absolutely*, and of the buildings till the expiration of the term. He erected them, himself, upon the leased premises for his own purposes, and without any original obligation to do so. They were not there when he took the premises, and having himself erected them, he was under no obligation to re-erect them when destroyed, at common law. He was only liable on his express covenant, which was, that the buildings he should put upon the premises, should "*revert to and become* the property of the parties of the first part [the lessors] *whenever by the terms of this indenture they shall come into possession of the premises.*" Until the premises should come into the possession of the lessors, therefore, the buildings remained the property of the tenant, the plaintiff in the case, and he was entitled to recover their value as owner.

So, also, in the case of *Walter* v. *Post*, 4 Abb. 382. The question is not raised by counsel, or discussed by the court. Certain instructions were asked, and refused, not presenting the point now involved; and the judge passed upon them as presented; and these were not even asked upon the idea of liability of the tenant to the reversioner, but upon an entirely different theory, and they were disposed of upon that theory. The judge afterwards remarks: "Had it appeared, however, that by the terms of the tenantcy the plaintiff was bound to repair," * * * then the "defendant was *liable*

to make good all the injury caused by the trespasses, and enable the plaintiff to put the building in as good condition as it was when the trespass was committed." This is but a general statement of the general rule, and is a *dictum* made wholly outside the case. He does not say, that the tenant could recover without first repairing, or making satisfaction to the landlord; but, on the contrary, in referring to the defects in the complaint he distinctly intimates the contrary opinion. He says: "There is, not only no averment, that the plaintiff was bound to repair, but *it is not even stated that he was put to any expense in repairing, or that he made any repairs;*" as though this averment, at least, was necessary. In effect he says: "That this essential fact is *not even stated,*" and suggests that when the case goes back this complaint can be amended in this particular. This case, therefore, so far as it is authority, at all, is against the plaintiff on this proposition.

Rood v. *N. Y. & E. R. Co.*, 18 Barb. 80, does not present the question at all. It is the case of a purchaser of land in possession under his contract of purchase. Rood, the plaintiff, having purchased of Maples, and gone into possession, and the action being to recover the value of wood and fences on the land burned up, through the negligence of defendant. He was the equitable owner of the land under his contract; and it was very properly held, that "the vendee in possession, being the equitable owner of the estate from the time of the contract for sale, must bear any loss which may happen to the estate between the agreement of purchase, and the conveyance. * * * The loss in question is, therefore, the loss of plaintiff, and not of Maples." (P. 83, 84.) The case of *Gourdier* v. *Cormack*, (2 E. D. Smith, 202,) does not present the question. There is a loose remark on a hypothetical case, that assumes the general rule, as to the right to recover in a proper way where there is a liability to repair; but there is nothing touching the question now under consideration. All the other cases relate to the taking and conversion of chattels, which depend upon different principles, and have no relation to the question now presented.

Where one wrongfully takes from the possession of another, any article of personal property, the party from whom it is taken can, undoubtedly, recover the possession, or the value of the property, without reference to the question, as to who, really, owns the goods. The title will not even be inquired into, unless the defendant connects himself with it. It is enough that one has, wrongfully, taken goods from the possession of another. He must return them, or respond to the extent of their value. So in this state, from its first organization, a party who has been dispossessed of land by a party having no title, can recover that possession on his mere possessory title and ouster, and the wrong-doer will not be permitted to show an outstanding title, without connecting himself with it. These cases have no bearing upon the question now in issue, but depend upon other considerations. In *Wood* v. *Griffin*, already cited, the court says: "This case is unlike the case of goods in the hands of carriers, factors, wharfingers, and other agents, who are responsible for them to their principals, because of the *different rules that apply to lands and goods.* In the case of lands in the possession of a tenant *his interest and the interest of the landlord are distinctly marked and easily separated; and for injuries to either, there are appropriate and distinct remedies, while as to goods there is, in general, no such distinction; and such is the effect given by the law to the fact of possession, that either trespass or trover may be maintained against one who wrongfully deprives another of such possession, without any injury to the ultimate title.* But beyond this, the authorities, so far as we have any, *are opposed to the claim of the tenant to recover damages for an injury to the inheritance until he has first satisfied the landlord;* and there is nothing in the state of the law in respect to such agents, carriers, *and others* in the possession of goods, that would induce us to extend it to a case like this." (Id. 240.)

I am satisfied that the plaintiff cannot recover for injuries set out in the first count until he has either repaired or made satisfaction to the lessors.

The demurrer must be sustained as to the first count, and overruled as to the second, which is for injuries to the estate of the tenant. And it is so ordered.

GEORGE W. TRAVER ET AL. v. PERRY G. BAKER.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 16, 1883.

1. PARTITION OF LANDS.—A partition of a tract of land, by a judicial decree, between part owners of the whole tract, does not change the character or origin of the title of any of the parties, but the portion which each takes in severalty under the decree is, in contemplation of law, the very portion which belonged to him as tenant in common, and he holds it thereafter under the same title and subject to the same obligations, covenants, and contracts as before.
2. QUITCLAIM DEED—COVENANT THEREIN.—A quitclaim deed to a "piece or parcel of land," describing it, only operates as a conveyance to pass the grantor's present interest therein; but if such deed also contain a covenant warranting the "possession" of said land against any claim "by" or "through" the grantor, it will estop him and his heirs and subsequent grantees from maintaining any suit to effect such possession.
3. UNRECORDED DEED, WHEN VOID.—A conveyance made in 1861, and not recorded within thirty days from its execution, is void as against a subsequent conveyance, first recorded, to a purchaser in good faith and for a valuable consideration.

Before DEADY, District Judge.

George H. Williams and George H Durham, for plaintiff.

Benton Killen, for defendant.

DEADY, J. This suit is brought by the plaintiffs, George W. and Emma S. Traver, citizens of the state of California, and George A. and Ida M. Graham, citizens of the state of Ohio, for the partition of lots 1 and 2, of block 256, of the city of Portland. The suit was commenced on October 16, 1879, and the case heard on the amended bill, answer thereto, and replication, together with the exhibits and testimony. The principal questions in the case are questions of law, and the facts material to their determination are substantially admitted. On February 22, 1861, Daniel H. Lownsdale executed a deed to John R. Wilkinson for the three fourths of block 256 of the city of Portland, the same being lots 1, 2, 3, 4, 5, and 6 of said block, describing the premises therein by metes and bounds coincident with the bordering lines of the adjacent streets and the east and

south lines of the north-west corner of the block, consisting of lots 7 and 8, then, as appears from the deed, in the possession of "Mrs. Adaline Wilkinson," which deed was acknowledged and filed for record on March 11, 1861.

The operative words of this deed are contained in this clause: "The party of the first part, in and for the consideration of six hundred dollars to him in hand paid by the party of the second part, has bargained and sold, and by these presents does bargain, sell, release, convey, and quitclaim unto the party of the second part all that piece or parcel of land situate within the corporate limits of the city of Portland," and described as above. After the *habendum* to the use and benefit of the party of the second part, his heirs and assigns forever, the deed proceeds: "The party of the first part covenants to and with the party of the second part that he will warrant and defend the party of the second part in the possession of the same, against all claims against the same, either through or by the party of the first part; and that said land is parcel of the claim of land awarded to the party of the first part, and as affirmed to him by the secretary of the interior of the United States, on the thirteenth of July, 1860, and ordered patent to issue to the party of the first part; and that if patent issue to the party of the first part, this shall be his deed to the party of the second part, in general warranty."

It is admitted that the defendant has succeeded, by a regular chain of conveyances, to the rights and interest of Wilkinson, under this deed, to lots 1 and 2 of block 256. Prior to and at the passage of the Donation act, on September 27, 1850 (9 Stat. 407), the grantor in this deed was a married man, and an occupant of a portion of the public domain, under the laws of the provisional government of Oregon, regulating the possession thereof, including block 256, and thereafter became a settler thereon under section 4 thereof, and having complied with the requirements of the act, and made proof thereof to the satisfaction of the surveyor general of Oregon, as provided in section 7 of the same, on October 17, 1860, he received a patent certificate for the donation, in and by which the east half thereof was

set apart to himself, and the west half, including said block 256, to his wife, Nancy, who had died on April 15, 1854, leaving her husband and four children surviving her, who thereupon, under said section 4, took said west half of the donation in equal parts, as the donees of the United States.

On January 17, 1860, Lownsdale purchased the interest of Isabella E. Gillihan, a daughter of Nancy by a former husband, in the donation, and on February 14 of the following year, conveyed an undivided two fifths of said interest to Hannah M. Smith, but the deed to her was not recorded until February 12, 1862. On May 4, 1862, Lownsdale died, leaving four children and the plaintiffs, Emma S. Traver and Ida M. Graham, the children of a deceased daughter; and on June 6, 1865, a patent to the donation was issued by the United States to the heirs of said Lownsdale and Nancy—dividing the same between them, as provided in the certificate.

On April 28, 1864, William T. Gillihan, a son of Nancy's by a former husband, brought a suit in the state circuit court for partition of the west half of the donation, in which the other children of Nancy and the heirs of Lownsdale, together with many other persons claiming divers blocks and lots therein as the vendees of Lownsdale, including Jacob Gozette, under whom the defendant claims, were made defendants, and on May 22 and August 12, 1865, said court determined that Lownsdale, as the survivor of Nancy and the grantee of Isabella E., was the owner in his life-time of an undivided two fifths of the west half of the donation, and that said William T. Gillihan, and Millard O. and Ruth A. Lownsdale, her children by said Daniel H., were then each the owner of an undivided one fifth of said half; and set apart and allotted to said three children, in severalty, certain portions thereof and the remainder to the heirs, vendees, or claimants under Lownsdale according to their respective interests, without determining what they were; and because said partition was unequal, it was further provided that the children of Nancy should be paid the sum of thirty-nine thousand one hundred and fifty-six dollars and two cents, to be apportioned among the several parcels of land

set apart to the heirs, vendees, or claimants aforesaid, and to be a lien thereon, of which sum four hundred and seventy-five dollars and thirty-seven cents was assessed upon lots 1, 2, and 3 of said block 256, and thereafter duly paid by said Jacob Gozette. On February 23, 1869, James P. O., a son of Lownsdale's by a former wife, purchased from Hannah M. Smith the interest formerly conveyed to her by Lownsdale, and afterwards, and before the commencement of this suit, said James P. O. and all the heirs of Lownsdale, except the plaintiffs, Emma S. and Ida M., conveyed their interests in the premises to the plaintiff, George W. Traver.

The defendant claims that the covenant in the deed of Lownsdale to Wilkinson is a warranty of "all that piece or parcel of land" described in the deed, in effect, as three fourths of block 256 against all persons claiming the same "through or by" the former, and, therefore, the plaintiffs who claim through him, as his heirs, are estopped to claim any interest in the premises, the same as Lownsdale would be, if living.

The plaintiffs deny that the covenant in the deed relates to or affects any interest in the premises except what Lownsdale then had—the one fifth he took as the survivor of his wife Nancy, and the three fifths of the fifth he purchased of Isabella E. and did not convey to Smith; and further, that the legal operation of the partition was to effect an exchange of distinct parcels of land between the heirs of Lownsdale and the children of Nancy, and that the former thereby took three fifths of block 256, as purchased from said children and not by descent from Lownsdale, and, therefore, they are not bound by his covenant or contract in relation thereto, and also, that they have since become the owner by purchase from Smith of the two twenty-fifths sold to her by Lownsdale, prior to his conveyance and covenant to Wilkinson, and, therefore, they are entitled to seventeen twenty-fifths of the premises, and the defendants to the remaining eight twenty-fifths—the interest owned by Lownsdale at the date of his conveyance to Wilkinson.

In the case of *Fields* v. *Squires*, 1 Deady, 391, I held that by this partition the land was divided between the children

of Nancy on the one hand and the heirs and vendees of Lownsdale on the other, according to the respective interests of the latter, without attempting to determine what they were, giving to the children in land and owelty what was deemed the equivalent of three fifths of the premises, and to the heirs and vendees in land charged with the payment of this owelty what was deemed equivalent to two fifths of the same, and I am still satisfied with the ruling. And in *Davenport* v. *Lamb*, 13 Wall. 428, this view of the matter is taken and stated by Mr. Justice Field as a matter of course.

This partition was not an exchange of distinct parcels of land owned in entirety by either party, but a separation of undivided interests in a tract theretofore owned by the parties in common. The portions or parcels then ascertained and set apart in severalty to the children of Nancy, were in contemplation of law the very three fifths which they took from the United States under the Donation act, after the death of their mother, and in like contemplation the remaining two fifths were the very portion of the premises which the heirs of Lownsdale inherited from him, subject, however, to the legal effect of the acts done and suffered by him, concerning the same. Neither was the character or origin of the estate or title of the parties changed or affected by this decree and partition. The heirs of Lownsdale took the two fifth tract by descent from him, as his heirs, and as such were and are so far bound by his acts and conduct relating to the same, as he would be himself, if living.

The rights of the parties in the premises must be determined then, by the operation and effect of the deed to Wilkinson. The operative words in the premises of this instrument are "bargain, sell, release, convey and quitclaim," and so far, it is only in legal effect a quitclaim deed—one in which no covenant was implied, and only served to pass the present interest of the maker. (*Lamb* v. *Kamm*, 1 Saw. 240; 2 Wash. R. P. 605–7.) But it purports to be not only a quitclaim of all Lownsdale's right, title, and interest in the premises, whatever that might be, but of "all that piece or parcel of land" situated and bounded as therein stated.

The subsequent undertakings or agreements in the deed,

while they cannot enlarge the effect of the granting clause, must be construed as referring to the subject-matter of the sale and quitclaim, as therein stated, that is, a certain "piece or parcel of land." These undertakings, though in some respects awkwardly and obscurely drawn, are easily divisible into three covenants which may be substantially stated as follows: 1. That Lownsdale will warrant and defend "the possession" of that "piece or parcel of land" to Wilkinson, his heirs or assigns, against all claims made "through or by" himself; 2. That "said land" was a part of the claim that had been awarded to Lownsdale and "affirmed" by the secretary of the interior on July 13, 1860, and a patent therefor directed to be issued to him; and, 3. That if such patent did issue to Lownsdale the deed then made to Wilkinson should be considered as one with a general warranty of the premises to the grantee.

The contingency contemplated by the last covenant only arose as to the one fifth interest, which Lownsdale took in the west half of the donation as the survivor of his wife. For this a patent was issued to him after his death, which inured to his heirs, and it is admitted that the deed to Wilkinson had the effect to divest them of that interest, and that the same is now in the defendant.. The second covenant was merely a personal one, having no prospective operation, like a covenant of seisin and did not run with the land.

The first one, so far as it relates to a claim made by Lownsdale himself, is a mere personal covenant of non-claim and would not estop any one but himself. But so far as it relates to a claim made "through" himself, it will estop any of his heirs or subsequent grantees from claiming the possession of any interest or estate in the premises, which the deed purports to convey.

Whatever right or interest the plaintiffs claim in this suit —except the two twenty-fifths purchased by James P. O. from Smith—they must claim "through" Daniel H. Lownsdale or his heirs, and that brings them within the express words of the covenant, so far as the deed purports to affect the premises. And as we have seen, it purports to sell and quitclaim the "land"—the whole estate or interest therein,

without any qualification or reservation, and not of any partial, limited or uncertain right or interest in the same.

The covenant of warranty is as broad as the subject-matter of the conveyance, and therefore estops the plaintiffs from maintaining any suit for the possession of any portion of or interest in the same, acquired through Lownsdale. That it was the intention of Lownsdale to sell and convey to Wilkinson not only his then undivided interest in the "land," but also all that he might afterwards acquire therein, and particularly by partition with his co-tenants, is manifest from the fact that he warranted Wilkinson in the possession of the same, as against himself and all persons claiming through him. For, if it was only intended to pass the interest which Lownsdale then had in the premises, be that much or little, the covenant of warranty was a useless and senseless act. (2 Wash. R. P., 665.) And I think that the price paid for the property, six hundred dollars for six lots fifty by one hundred each, in the woods in 1861—indicates that the sale was, as it purported to be, of the "land," and not an undivided two-fifths interest therein.

Three cases have been cited from the decisions of this court to show that the covenant of warranty in this deed does not affect any interest in the premises but that which Lownsdale then had. They are *Lamb* v. *Burbank*, 1 Saw. 232; *Lamb* v. *Kamm*, Id. 238; and *Lamb* v. *Wakefield*, Id. 257.

In the first of these cases, it may be said, that the deed—a quitclaim, of March 8, 1850—purported to convey the land—"lot 4 in block 7." But the court held, that this only passed the estate which Lownsdale then had in the premises—the bare possession under the laws of the provisional government. In coming to this conclusion, weight was probably given to the fact that all parties knew they were simply dealing with the possession and to the further fact that the deed contained a covenant that if Lownsdale obtained title from the United States he would convey the same. The case was heard upon a demurrer to the bill alleging that the deed was fraudulent and void, and a cloud on the plaintiff's title, who claimed the property as heir of Lowndale. What was said upon this point may be considered as *obiter*, as the defendant could protect himself under

the covenant to convey, if the deed was valid. The other two cases are not in point. The deeds, in both of them only purported to pass all "the right, title, and interest" of Lownsdale in the premises.

As to the two twenty-fifths interest, purchased by James P. O., from Smith on February 23, 1869, for one thousand and fifty dollars, the plaintiffs are not prevented by Lownsdale's covenants to Wilkinson, from claiming the same. Lownsdale had conveyed this interest to Smith a year and eight days before he made the deed to Wilkinson, and neither she nor her grantee are in this respect affected by any subsequent sale or covenant of Lownsdale's.

But it is alleged in the answer that the deed to Smith is void as against Wilkinson, because it was not recorded until after March 11, 1861. By section 27 of the act relating to conveyances, then in force in Oregon (Code of 1854–5, p. 522), it is provided that a deed not recorded within thirty days from its execution, "shall be void against any subsequent purchaser in good faith and for a valuable consideration" of the same property, whose conveyance shall be first recorded. It does not appear from the answer but that Smith's deed was recorded within thirty days from its execution. It is only alleged that it was not recorded until after March 11, which may be true, although it was recorded within twenty-six days from its execution. Nor is it alleged in the bill that it was ever recorded. But the plaintiffs have put the deed in evidence, and it appears therefrom that it was not recorded until February 12, 1862.

No question is made but that Wilkinson was a purchaser in good faith and for a valuable consideration. Smith's deed was recorded after Wilkinson's and more than thirty days after its execution, and therefore the statute postpones it—declares it void, as against Wilkinson's. The plaintiffs, as to this interest, now claim under this void deed against a grantee under Wilkinson, and their right is the same as if the suit was brought by Smith against Wilkinson.

The plaintiffs not having any interest in the premises which they can assert in this court against the covenant of their ancestor and grantor, the bill for partition is dismissed.

WALTER J. BURNS *v.* MULTNOMAH RAILWAY CO.

CIRCUIT COURT, DISTRICT OF OREGON.
FEBRUARY 23, 1883.

1. COUNTY ROAD—JURISDICTION TO ESTABLISH.—The county court has no jurisdiction of an application to establish a county road, except upon the petition of twelve householders of the vicinage, and notice to the persons concerned, as prescribed in sections 2 and 3 of the road law. (Or. Laws, 721.)
2. IDEM—ORDER ESTABLISHING.—An order establishing a county road must direct the survey thereof to be recorded; and where the order provided that the survey should be recorded when the petitioners gave a bond to open a portion of the proposed road, which was never done, and the record never made, the road was not established.
3. LEGISLATURE—POWER OF, TO LEGALIZE ACTS OF COUNTY COURT.—The legislature may legalize the act of a county court in establishing a road without a legal petition, but not without notice to the persons concerned.
4. TAKING PRIVATE PROPERTY FOR PUBLIC USES.—The legislature being prohibited (Or. Con., Art. I, sec. 18), from taking private property for public use, without just compensation therefor, it is necessarily implied thereby that the owner of the property so taken, shall have notice of the proceeding for appropriation, and an opportunity to be heard thereon.
5. FOURTEENTH AMENDMENT—DUE PROCESS OF LAW.—Under the fourteenth amendment a state cannot appropriate private property for any purpose without due process of law, which includes notice of the proceeding and a prescribed opportunity to be heard upon the question involved.
6. GRANT OF THE USE OF A STREET TO A RAILWAY COMPANY.—A grant by a county court, under section 26 of the corporation act (Or. Laws, 530), of the use of a street to a railway corporation for the purpose of constructing and operating a railway thereon, is a grant of a franchise, and the order or agreement making the same must be construed most strongly against the corporation and in favor of the public, so that nothing shall pass thereby but what clearly appears to have been intended.
7. IDEM—CASE IN JUDGMENT.—Where the agreement authorized a corporation, proposing to construct a railway from Albina to Vancouver, to lay its track through the former place upon certain streets therein—"beginning at the ferry-landing at the foot of Mitchel street"—and it appearing that said ferry landing and Mitchel street were different and not contiguous places: *Held*, That the ambiguity must be resolved against the corporation, and the agreement construed as if it read simply, "at the foot of Mitchel street."
8. APPROPRIATION OF STREET OR HIGHWAY BY RAILWAY.—A railway corporation cannot be authorized under section 26 of the corporation act aforesaid, to appropriate a public street or road to its use, unless such road or street has been legally established, according to some mode prescribed by statute.

Before DEADY, District Judge.

George H. Williams, H. Todd Bingham, and Edward W. Bingham, for plaintiff.

Charles B. Bellinger, for defendant generally, and *Joseph N. Dolph*, as to the power of the county court to appropriate a public road or street for the use of a railway, without compensation to the owners of the adjacent property.

DEADY, J. The plaintiff brings this suit to restrain the defendant from obstructing the way to and from the east side of the Wallamet river, at the southern end of river block 19, in the town of Albina, and just north of East Portland. On filing the bill, on January 8, 1883, an order was made that the defendant show cause why a provisional injunction should not issue, and that the defendant be restrained in the meantime, as prayed in the bill. The application for a provisional injunction was heard on the bill and answer, and sundry affidavits and exhibits.

From these it appears that the plaintiff is a British subject, and the defendant a corporation organized under the laws of Oregon since May 11, 1882, for the purpose, "in part," of constructing and operating a street railway from or near East Portland or Albina, to the Columbia river, opposite the town of Vancouver, W. T. On May 28, 1873, George H. Williams, W. W. Page, and Edwin Russell, were the owners as tenants in common, of the tract of land on the east side of the river, including the premises now claimed by the plaintiff, upon which they then laid out the town of Albina, and duly platted and recorded the same—the said Russell being then the owner of an undivided one half of said land.

A street called River street, being sixty feet wide and running from the northern limit of East Portland, northerly, along and parallel with the river and about one hundred and eighty feet distant therefrom, was duly designated on said plat; and the land between said street and the river, below the ferry landing, was divided thereon into blocks

called "River Blocks"—the most southerly one being designated and numbered as "Block 19." But that portion of the tract lying to the southward of block 19 and to the westward of River street, containing about one and a half acres, was not laid off into lots or blocks.

A street called "Mitchel street," was also designated upon said plat as commencing at and running easterly from River street—its width being sixty feet and the centre line thereof about eighty feet distant to the northward from the southerly side of block 19.

On August 4, 1875, a strip of land about sixty feet in width, and adjoining block 19 on the southward and extending from the water line easterly to River street, was used by the public with the consent of the proprietors as a way to and from the ferry which plied between Albina and North Portland; and on that day Edwin Russell and others, but who or how many others does not appear, petitioned the county court of Multnomah county "to open a county road leading from the ferry landing in the town site of Albina in a northwesterly direction along the line of the new graded road to the Vancouver road, thence northerly along the said Vancouver road to the north line of section 27 of township 1 north, of range 1 east," thence by course and distance along and through said section 27 and sections 23 and 24 of the same township, and "thence northerly and easterly, following wherever practicable what is known as the Payne road to the Slough road;" whereupon the county court made an order appointing viewers and a surveyor "to view and survey said proposed road."

On September 4, 1875, said viewers filed their report, together with the notes of the survey, reciting therein that they had been appointed "to view and locate a proposed county road, beginning at the ferry landing in Albina and running northerly and easterly to the Slough road, near the residence of Benjamin Sunderland," and recommended "that the prayer of the petitioners be granted, on condition that they shall open that portion of the line between the middle of sections 23 and 24" aforesaid "at their own expense."

On September 13th, the county court made an order adopting said report, and declaring, "that the proposed road be, and the same is hereby declared to be a county road, according to the survey notes thereof on file in this court, upon the condition that the petitioners for the same shall file in this court a bond, to be approved by the court, in the sum of five hundred dollars, said bond conditioned that said petitioners will open that portion of said road lying between the middle of sections 23 and 24, township 1 north, range 1 east, at their own expense; and that upon the petitioners complying with the foregoing condition, that said notes of survey be recorded at length in the record of road surveys, and that said road be declared to be a county road, and that the supervisor of the road district do open and work said road as other roads in his district."

These facts concerning the application for, and the view and survey of this proposed road, are shown by a certified copy of the entries in the records of the county court; but the petition itself is not found. A paper purporting to be a notice of the application, dated July 6, 1875, is found among the files of the court, with an affidavit of S. S. Douglas indorsed thereon, showing that it was duly posted, but it is not signed by any one, nor does it indicate in any way at whose instance it was posted. Nor does it appear that the petitioners ever gave the bond or opened the road, as required by the order of court, or that the said "notes of survey" were ever recorded in the "record of road surveys," as provided thereby.

In the year 1879 J. B. Montgomery became the owner of the undivided interests of George H. Williams and W. W. Page in said tract of land, and prior to January 5, 1883, he became the owner of the whole interest therein, at which date he sold and conveyed to the plaintiff, for the consideration of sixteen thousand dollars, a portion of the premises, about eighty feet wide, lying on the southerly side of block 19 and adjacent thereto, and extending from the water line to River street, together with the vendor's interest in the eighty feet of said street adjacent to the premises, and in the tide and overflowed lands in front thereof; reserving

a ferry landing thereon for the ferry licensed by the county court to the vendor and Wilson on the —— January, 1883, with "egress to and from said landing across the said premises."

On October 5th and December 6, 1882, the county court, upon the application of the defendant, ordered and agreed with it, to the effect that it might construct and operate a railway propelled by steam or horse-power for the transportation of passengers through the town of Albina—"Beginning at the ferry-landing at the foot of Mitchel street, thence along said street to Loring street," and thence along sundry named streets and the county road leading to St. John to a "gulch" nearly east of the "coal bunkers," below Albina—upon the conditions following: (1) The use of steam is confined to dummy engines, such as are commonly in use in eastern cities. (2) The cars are not to be run through Albina faster than six miles an hour. (3) The track is to conform to the grade of the streets of Albina as they are, or may be, provided such grades are practicable.

In the answer of the defendant it is alleged, that it has already expended "about forty thousand dollars in making preparations for the construction" of its road, but it does not appear that anything has been done on the ground towards such construction but the erection of a trestlework upon the land conveyed to the plaintiff for the apparent purpose of laying a track thereon as a standing or starting place for the cars, in connection with a waiting-house or station, to be constructed at the easterly end and southerly side of the same.

This trestlework is constructed three feet above the grade or ground at the upper or easterly end, and nine and a half feet at the lower or westerly end. It is sixty feet long and five feet in width across the stringers, and eight feet across the caps of the bents. The centre of it is forty feet from and parallel with the southerly side of block 19, and the upper end is within twenty feet of the westerly side of River street, while the lower end is one hundred feet from the water line; and it is understood that the upper end is to be extended to River street and a waiting-house erected

on the southerly side of this twenty feet, and a platform constructed at the lower end with a stairway leading therefrom to the ground, with a view of facilitating the egress of passengers to and from the present ferry landing.

The plaintiff rests his right to the relief sought upon the following grounds: (1) There is no county road between the ferry landing and River street, because the county court did not acquire jurisdiction to establish one there, for the reason: (*a*) The notice of the application was anonymous—not signed by any one. (*b*) The petition was not signed by twelve householders of the vicinage as required by statute.

2. The order actually made by the court was a conditional one, to take effect when the petitioners gave a bond to open a portion of it, which was not done.

3. The notes of the survey were never recorded, and therefore the road was not established, even if the court had jurisdiction.

4. Said notes were not recorded because the court in effect directed that it should not be done until the petitioners filed the bond as required.

5. If there is a legal road between the ferry landing and River street, the defendant is not authorized to occupy or use either because its license from the county to use the streets of Albina, in legal contemplation begins at the foot or westerly end of Mitchel street, on the easterly side of River street, and not at the ferry landing.

6. And if the license to defendant authorized it to begin its track at the ferry landing, it is not thereby authorized to occupy or use the road or street with a trestle work and waiting house, which not only obstruct the use of them as public highways, but shut off any access to them from the plaintiff's adjoining property; and,

7. The county court could not authorize the defendant to appropriate any portion of a public road or street to its use for the purpose of a railway track without first making compensation to the adjacent property holders, including the plaintiff, for the additional burden imposed on such road or street.

The defendant substantially admits that the proceedings

had in the county court on the petition of Edwin Russell, concerning this road were void, for the want of a legal notice and petition, but maintains its right to the use of the same, notwithstanding, for the reasons following:

1. There was a dedication of the way to the public use by the proprietors of the property before the application to the county court to establish a road there;

2. Edwin Russell, under whom the plaintiff claims, having instituted the proceeding in the county court for the establishment of this road, is estopped to deny its validity, and therefore the plaintiff is so estopped also;

3. That by the proviso to section 4 of the road law (Or. Laws, 721), as amended by the act of October 24, 1882 (Ses. L., 60), which reads: "That all roads viewed, surveyed, and recorded by order of any county court of this state subsequent to October 29, 1870, and the said road has not been defeated by remonstrance, as now provided by law, or has not been made or declared vacant by existing laws, shall be, and the same are, hereby" declared public highways—said road is established as a public highway according to the survey thereof;

4. That by section 26 of the corporation act (Or. Laws, 530), the county court was authorized to agree with the defendant for the use of any public road or street in the county, and not within the limits of any municipal corporation whereon to locate and construct its railway, and that in pursuance thereof it did authorize the defendant, by the order and agreement above mentioned, to use the road leading from the ferry landing to River street, and said street from there to the foot of Mitchel street for said purpose; and,

5. That the establishment or dedication of a road or street as a common highway, either by public authority or the act of the owner of the property, is, since the passage of the corporation act aforesaid, October 11, 1862, impliedly made subject to the power of the county court, under section 26 thereof, aforesaid, to impose upon such road or street a further public use by authorizing the location and

operation of a railway thereon, without any compensation therefor being made to the owners of the adjacent property.

The plaintiff replying to the proposition of the defendant that by the healing operation of the proviso to section 4 of the road law, as above quoted, this way has become a valid county road, says:

1. This proviso is void, because the subject of it is not expressed in the title of the act in which it is contained, as required by section 20 of Article IV of the constitution of the state;

2. It is not applicable on its face to roads which have been "declared vacated" or void "by existing laws," as this one had in effect then been by the decision of the supreme court of the state, in *Minard* v. *Douglas County*, 9 Or. 206;

3. The proviso, as claimed by the defendant, is an exercise of judicial power by the legislature contrary to section 1 of Article III of the constitution of the state, and therefore void; and,

4. It is also void, because thereby the state undertakes to deprive persons of their property without due process of law, contrary to section 1 of Article XIV, of the national constitution, which, among other things, provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law."

Having thus stated the case and the grounds of the contention between the parties, at some length, as developed on the argument, I will briefly consider the same, so far as may be necessary to dispose of the motion for a provisional injunction.

And, first, the proviso in the act of 1882 cannot have the effect to validate or legalize the road in question. A road "viewed, surveyed, and recorded" by the order of a county court without the petition of twelve householders, and due notice of the application to persons interested therein and to be affected thereby, in other words, upon its own motion, is void and illegal. This is plain upon both reason and authority. (See *Minard* v. *Douglas County*, 9 Or. 206.) Can the legislature make it legal by declaring it to be so, not-

withstanding? Clearly not; unless it had the power to have established it in that manner in the first place. It may be admitted that the legislature can authorize or provide for the establishment of a highway without a petition from any one, and, therefore, it may legalize one which has been otherwise duly established by the county court.

But the legislature cannot take private property for public use without "just compensation." (Art. 1, sec. 18, Or. Con.) And how can it ascertain or make such compensation unless the owner of the property has reasonable notice of the proceeding and an opportunity to be heard upon the question? It is true, that when the property is taken by the state, as in this case, the constitution does not require the compensation to be "assessed and tendered" before the property is taken. But even in that case the law which provides for the taking must also provide for the assessment and payment of the compensation at some time in the proceeding, and unless this can be done *ex parte*, which I very much doubt, the legislature cannot authorize the appropriation of private property to public uses without notice to the owner, and, therefore, cannot legalize a proceeding for that purpose when it has been had without such notice.

In *Minard* v. *Douglas County*, *supra*, the supreme court says: "That the right to notice springs out of the principle; the power of the government to take private property for public purposes is not absolute. It is qualified by the obligation to make compensation to the owner. This compensation cannot be made *ex parte*."

But under the fourteenth amendment, it is too plain for argument, that the state cannot, by the agency of either its legislative or judicial department, take the property of any person for the establishment of a highway or other purpose, "without due process of law." And this, it is generally agreed, includes at least legal notice of the proceeding and a prescribed opportunity to be heard upon the question involved therein. (*The Railway Tax Cases*, *ante*, 244, 13 Fed. Rep., Field, J., 748, Sawyer, J., 762; *Stuart* v. *Palmer*, 74 N. Y. 183; *Davidson* v. *New Orleans*, 96 U.S. 99.) This provision

of the common constitution of the country was intended, as was said by this court (*In re Ah Lee*, 6 Saw. 414), as a "bulwark against local tyranny and oppression," and under its protecting operation, this proviso, as to any road which has been "viewed, surveyed, and recorded" by the order of any county court, without notice to the owner of the property appropriated therefor, is simply void.

But even if this proviso were valid, this road is not within its purview. It was never recorded by order of the county court or at all. In fact, its record was postponed by order of the county court, until the petitioners should give bond for the opening of a portion of the proposed road, which it seems they never did. And further, by the very terms of section 5 of the road law (Or. Laws, 723), until the report of the viewers, the survey and plat of the surveyor are recorded by the order of the county court, a proposed road is not considered established as a public highway.

Neither was Edwin Russell estopped by his petition for the establishment of this road, to deny its legality or that it ever was established. It is not claimed that any one else was estopped by the proceeding. Certainly the public were not, including his co-tenants, George H. Williams and W. W. Page. Estoppels, to be effectual, must be mutual.

But so far as appears, Russell declined to accept the road upon the terms proposed in the order of the court, and therefore, it may be inferred, did not give the required bond, and so the matter fell through. Nor is the plaintiff estopped for this reason, if Russell is, for he does not appear to claim under Russell for more than an undivided one half of his property, and he may assert any right pertaining to his ownership of the other half, as if that was the whole of his interest.

Neither does the evidence show a dedication of the road by the proprietors to the public, as a highway. So far as appears, it is not shown or designated on the town plat, as a way of any kind, and there is no other evidence of dedication worth mentioning or considering. It is admitted that there has been a user of the premises as a way for seven or eight years, with the knowledge and consent of the propri-

etors. But that is not sufficient to establish an adverse right in the public, as against the owner. To have this effect, the use must have the duration and character necessary to establish the bar of the statute of limitations, against an action for the possession. It must have been adverse under a claim of right.

The agreement between the defendant and the county court for the use of certain streets in Albina, is uncertain and ambiguous, as to the point or place where the former is authorized to commence the laying of its track. So far as Albina is concerned, the petition is spoken of in the order, as an application for the use of "streets," and the road or way between the ferry landing and River street is not mentioned directly or indirectly.

The license is to lay a railway track and "to operate thereon a railway" "through the town of Albina"—"Beginning at the ferry landing at the foot of Mitchel street." But there is no "ferry landing" at the foot of Mitchel street. The "ferry landing" and "the foot of Mitchel street" are different places. Neither are they contiguous; and there is no mention of or reference in the agreement to River street, which must be used for about one hundred feet to connect the upper end of the ferry landing or road with the foot of Mitchel street.

The first call may well include the land from low to high water mark, opposite the landing, and this it is understood will carry it up to River street and beyond. The second one is a more limited and definite point, though there is probably a well grounded contention, as to whether the "foot"—the end—of Mitchel street is at the easterly or westerly line of River street. This agreement is the grant of a franchise, or special privilege by the public to the defendant, and it must be construed most strongly against it. Any material doubt or ambiguity in it must be resolved in favor of the public.

In *Stourbridge Canal* v. *Wheeley*, (2 Barn. & Adol., 793), the court of king's bench say—"The canal having been made under an act of parliament, the rights of the plaintiff are derived entirely from that act. This, like many other

cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this: that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." In the *Charles River Bridge Case* (11 Pet. 544), this language was cited by Mr. Ch. J. Taney, with approbation, and the rule of construction contained therein, applied by the court to the case under consideration.

As the agreement is so ambiguous if not contradictory, as to the place of beginning, it must stand, if at all, as a license for the lesser privilege and more particular designation rather than the greater and more general one—as if it read—"Beginning at the ferry landing, to wit: at the foot of Mitchel street." And this I think was what the court contemplated in making the grant. For it is not reasonable to suppose, that in granting a request to lay a track through the "streets" of Albina in the construction of a railway from that place easterly to Vancouver that the court ever thought of authorizing a track to be laid upon the "road" leading down from River street westerly to the river.

Neither do I think that the license of the defendant authorizes it to construct such trestle work as this, or platforms for the use of cars, or waiting-houses for the convenience of passengers, on any road or street. If it wants property for any such exclusive use or purpose as that, it must obtain it elsewhere than on a public road or street, and by purchase from those to whom it belongs. Its license is to lay a track on the grade of the streets as they are or may be, so that it will not materially interfere with their use for the purposes of ordinary travel. The erection of a warehouse or a roundhouse upon this ground would not more materially interfere with this use, than the trestle work and waiting-house which the defendant is engaged in constructing.

Upon this view of the matter, a provisional injunction must issue. Therefore it is unnecessary to decide whether

the defendant can be authorized by the county court to appropriate a public road or street for the construction and operation of a railway without compensation to the owners of the adjacent property for the new and additional burden thus imposed on the land. The question has been thoroughly argued by counsel, and I have a decided impression upon it. But it is one upon which I prefer not to anticipate the decision of the supreme court of the state, if I can avoid it. However, there is one suggestion, which may not be amiss here, and that is, that the provision of the corporation act, authorizing the county court to allow the use of a "public road or street," for "the location and construction" of a railway or other road, only applies to a road or street legally established according to some mode prescribed by statute, and not to one that exists merely as a matter of fact, and by sufferance of the owner of the property, or by mere parol dedication or public use.

Let the provisional injunction issue on the plaintiff's giving bond to the approval of the master of this court in the sum of ten thousand dollars, restraining the defendant as prayed for in the bill until the finding or further order of this court.

SPRING VALLEY WATER WORKS *v.* WASHINGTON BARTLETT, MAYOR ETC., ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
MARCH 9, 1883.

1. INJUNCTION—JURISDICTION TO ENJOIN BOARD OF SUPERVISORS FROM PASSING AN ORDINANCE.—The courts have jurisdiction to enjoin the board of supervisors of a municipal corporation from passing an ordinance, which is not within the scope of their powers, where the passage of such ordinance would work an irreparable injury; and where a proper bill is presented, the circuit court of the United States, or a judge thereof, is authorized, by statute, to issue a restraining order to preserve the rights of the parties *in statu quo*, until the question, as to the right of the complainant to an injunction, can be fully heard, and determined.
2. ORDINANCE VOID ON ITS FACE.—Where an ordinance would be void on its face, by reason of its unconstitutionality, and no irreparable injury could result from its mere passage, there being an adequate remedy at law

against any attempt to enforce it, after its passage, a court of equity wil not enjoin its passage.

3. VOID ORDINANCE—IRREPARABLE INJURY.—But, where an ordinance would be void for want of authority to pass it, yet, if irreparable injury would result from its mere passage, or where there is the physical power to execute the void ordinance, notwithstanding its invalidity, by means of the instrumentalities provided, and the only adequate remedy against an irreparable injury arising from its actual enforcement after its passage, is an injunction, the court may enjoin the passage of the ordinance. There appears to be no sound reason why the court should not interfere at one stage of the proceedings, as well as at another.

4. UNCONSTITUTIONAL ORDINANCE.—An ordinance which appears upon its face to violate the fourteenth amendment to the constitution of the United States, is void, and it can cast no legal cloud upon the rights of the parties, apparently, affected by it. All parties are, legally, presumed to know its invalidity.

5. IMPAIRING OBLIGATION OF CONTRACT.—The corporation, known as The Spring Valley Water Works, was organized under the statute of 1858, which provided that the price of the water furnished to San Francisco and its citizens, should be fixed, annually, by two persons appointed by the city, two by the corporation, and one to be chosen by the other four; and in case the four cannot agree, the other to be appointed by the sheriff of the county. The fourteenth article of the constitution of California, afterwards adopted, changed this mode without the consent of the corporation, and, provided, that the price of the water should be fixed, annually, by the board of supervisors of the city and county, alone—giving the corporation no voice in the matter. *Held:* Upon the authority of the *Elevator* and *Granger Cases* in the supreme court of the United States, that said article of the state constitution is not void, as taking private property for public or private use without compensation; or without due process of law; or as conferring the sole power to fix the rates upon the purchaser. 2. That under the decision in the *Sinking Fund Cases*, it does not impair the obligation of a contract, within the meaning of the several provisions of the constitution of the United States relating to those subjects.

6. DISQUALIFICATION BY REASON OF PLEDGES OF CANDIDATES FOR OFFICE.—Assuming that the citizens of San Francisco are authorized, through their representatives, constituting the board of supervisors, to lawfully fix the price of the water furnished by The Spring Valley Water Works to, and purchased by, the city and its inhabitants, the fact that candidates for the office of supervisors pledged themselves to the people, in accordance with the requirements of the resolutions of the public meeting nominating them before the election, does not disqualify the supervisors elected upon such pledges from acting in fixing the price of water.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

MOTION for injunction. The facts appear in the opinions.

C. N. Fox, F. G. Newlands, and *S. M. Wilson,* for complainant.

Stanly & Hayes and *Wm. Craig, city and county attorney,* for respondent.

By the Court, SAWYER, Circuit Judge. This is an application for an injunction, pending the litigation, to restrain the mayor and supervisors of San Francisco from passing the ordinance set out in the bill, or any other ordinance, to fix the price of water supplied to the city and people of San Francisco, for one year, from July 1, 1883, in pursuance of the provisions of article XIV of the constitution of California.

The Spring Valley Water Works is a corporation created under the general statute of California, entitled "An act for the incorporation of water companies," passed April 22, 1858 (Stat. 1858, 218). Section 4 of this act provides that: "The rates to be charged for water shall be determined by a board of commissioners, to be selected as follows: Two by such city and county, or city or town authorities, and two by the water company; and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners cannot agree upon a fifth, then, the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established."

Article XIV of the constitution of 1879, adopted since the organization of the Spring Valley Water Works, under the said act of 1858, and since complainant completed its works, and introduced water into the city of San Francisco in pursuance of the provisions of that act, changed the mode of fixing the price of water, by providing as follows: "Provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city and town, or the inhabitants thereof, shall be fixed, annually,

by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance, or otherwise, in the manner that other ordinances, or legislative acts, or resolutions, are passed by such body; and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinance, or resolution fixing water rates, when necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties, as the legislature may prescribe. Any person, company, or corporation collecting rates in any city and county, or city, or town in this state, otherwise than as so established, *shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use.*"

The complainant insists, that said article XIV of the state constitution, so far as it is applicable to the Spring Valley Water Works, is, absolutely, void, as being in conflict with article 1, section 10, of the constitution of the United States, prohibiting the passage of any law impairing the obligation of a contract; and of the fourteenth amendment of the national constitution providing, that no state shall "deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws." It is urged, that the provision in the act of 1858, prescribing the mode and tribunal for fixing the price of water, is a term of the contract, under which the complainant expended many millions of dollars in introducing water, by the terms of which, the vendor as well as the vendee had a voice in fixing its price, which, it is claimed, is a right of great value; while the fourteenth article of the state constitution abrogates that term of the contract, deprives the vendor of any voice in fixing the price of the water it brings into the city, for sale, and gives to the vendee—the buyer—the entire control of

the price, which it may fix at rates that will be ruinous to complainant; and in case it refuses to submit, the complainant will forfeit all its property to the city. It is, also, insisted that for the city to fix the price, in its discretion, at unremunerative rates, is, to that extent, to deprive complainant of its property for both public, and private, uses without compensation, or due process of law.

Also, that to take from complainant any voice in fixing the price of the commodity, which it introduces into the city for sale, and confer the power to determine the price upon the purchaser, is to subject it to conditions and limitations, as to the control and free use of its own property, not imposed upon other persons with respect to their property; and in this respect deprives the complainant of the equal protection of the laws.

These are grave questions; and their gravity cannot fail to arrest the attention of those familiar with the early public history of the city, whose recollection carries them back to a comparatively recent period, when our citizens were compelled to procure their daily supplies of water for domestic uses from carts, and to store it in barrels, obtaining for their money much less in quantity, and an article greatly inferior in quality, to that now brought into the city, and delivered in every room of their houses, under the stimulus of the inducement to complainant held out by the provisions of the act of 1858.

The first ground of objection to the bill, confidently, relied on by defendants, though urged in argument, apparently, less confidently by their counsel, is, that, they are a legislative body, endowed with legislative powers to be exercised with absolute discretion; and that they are not amenable to the jurisdiction of this, or any other court, to inquire into their acts; that neither this court, nor any other court, has any power, in any case, to control, or limit their action, in their legislative capacity; and, consequently, that it has no jurisdiction to investigate their proceedings. In view of the large multitude of cases cited by counsel on both sides, in which the relative powers of the courts and similar municipal bodies have been discussed, and deter-

mined against those public officers, upon various grounds, depending upon the varying circumstances of each particular case, the position, at least, challenges attention for its boldness.

But the substantial and principal ground upon which the complaint rests its case, cuts under, and lies beyond the reach of this objection. It is, that, the provisions of the state constitution, upon which the defendants' authority to deal with the matter in question, at all, rests, is in conflict with the constitution of the United States, and is, therefore, utterly void. If this be so, then defendants, have no authority of any kind, legislative, judicial, or administrative, to deal with the question at all. They are not acting within the scope of their authority, and have no discretion in the matter. Article VI of the constitution of the United States, provides that: "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law of the land:* and the *judges in every state shall be bound thereby*, anything in the *constitution, or laws* of *any state to the contrary notwithstanding.*"

The supreme court of the United States, from its earliest organization to the present time, has given the fullest effect to this provision. In *Seibold's Case*, so late as 100 U. S. 376, that court said: "An unconstitutional law *is void and is no law.* An offense created by it is not a crime." And again, on pages 392 and 397, "The constitution and laws of the United States are the supreme law of the land, and to those every citizen of the United States owes obedience, whether in his *individual or official capacity* * * *. The laws of this state, in so far as they are inconsistent with the laws of congress on the same subject, *cease to have effect as laws.*" In the presence of this provision, and this authoritative construction of the provision of the national constitution, the provision of the state constitution, if in conflict with it, disappears. It is as though it had been expunged from the state constitution leaving a blank page, and the authority of the defendants under it is no greater than that

of any other equal number of citizens of San Francisco. Of course, it is not to be expected that officers, not judicial, of a municipal corporation, will take it upon themselves to adjudge a provision of the state constitution to be void, and disregard it. But under the constitution of the United States, a judicial department of the government has been established, expressly, to interpret, construe, administer and enforce all the provisions of that constitution, and of the laws and treaties made in pursuance thereof; and in the performance of the judicial functions thus devolved upon that department, the courts, not only have the jurisdiction, but the duty is imposed upon them, to ascertain and adjudge, upon a case presented, whether the provisions of any constitution, law or proceeding of subordinate governments or bodies, are in conflict with the constitution and laws of the United States; and, if so, to give effect to the national constitution, such subordinate constitution, law, or proceeding "to the contrary notwithstanding." So, also, the statutes of the United States expressly empower the courts, and their judges, when, in their judgment, a proper case is presented, to issue a restraining order to preserve the subject-matter of litigation in *statu quo*, until time and opportunity can be had to investigate the case, and, intelligently, determine, judicially, whether the party complaining is entitled to an injunction, or not. When a case is presented, which, in the judgment of the court or judge, justifies such preliminary restraining order, it is a duty imposed upon such court, or judge, which he cannot legally evade, if he would, to issue the temporary restraining order, and enforce it, to the best of its, or his ability, with such aid as may be afforded by the executive department of the government, in pursuance of the duty imposed upon that department by the constitution and laws of the United States.

The action of the court thus far in the matter, has been, strictly, within this broad general jurisdiction and duty. We do not understand, that defendants' counsel controvert these propositions. Keeping these general jurisdictional questions distinct from the others, that may arise, and do arise, in this case, it remains to be considered whether, as in all other

bills seeking an injunction, the facts stated in the bill, present in this particular instance, a case entitling the complainant to the issue of an injunction, upon the hearing now had, within the general principles of equitable jurisdiction.

Upon this question, counsel for defendants insist with great earnestness, that the contemplated action of defendants, is, strictly, *legislative* in its character, within their absolute discretion; and that no court can interfere with, or control, its strictly legislative discretion; consequently, that the bill presents no case for an injunction.

If the position of complainant is tenable, that the fourteenth article of the state constitution is absolutely void, as being in conflict with the national constitution, then the defendant's proposition, if true, as we have already seen, has no application; for they are acting wholly outside of any authority of law. Their action is neither judicial, legislative, nor administrative. There is no discretion, no authority to act upon the subject at all. The provision is a mere nullity, and that ends the case, so far as this point is concerned. But the authorities do not sustain the broad proposition of defendants, as claimed, even conceding some general authority to act. The very case cited by defendants, and in the authorities relied on by them as sustaining certain distinctions drawn between trusts, legislative action, judicial action, etc., repudiates this proposition. Those cases, however, do not go to the broad proposition insisted upon by defendants' counsel, but go to the special equities of the particular cases in which the points are considered, and relate to abuses of power in cases which, if not fully authorized by law in those particular instances, are within the apparent general scope of their powers; and not, absolutely, outside of all legal authority to act. The case referred to as a leading one, and often cited in subsequent decisions, is *Davis* v. *Mayor of New York*, 1 Duer, 452. In this case says Mr. Justice Duer, one of the ablest judges who ever occupied the bench in New York city: "I shall treat the resolution as an ordinance, or by-law, and its reconsideration and adoption as properly acts of legislation, in the fullest sense, in which the term, legislation, can be justly applied to the

acts of a corporate body. Making these concessions, the denial of the jurisdiction of this Court amounts to this—that a Court of equity of general jurisdiction, has no power, in any case, or for any purpose, to restrain the legislative action of a municipal corporation, or in any manner to interfere with, or control its legislative discretion, no matter to what subject the action may be directed, nor how manifest and gross the violation of the law, even of the provisions of its own charter that it may involve, and no matter by what motives of fear, partiality, or corruption, its discretion may be governed, and how extensive and irreparable the mischief that, in the particular case, may be certain to result to individuals or the public from its threatened exercise. * * *

"In justice to the counsel for the defendants, it must be admitted, that they shrank not from maintaining the truth of the propositon in all its extent, well perceiving that the necessity of the argument admitted no alternative, since to admit a single exception, was to admit the jurisdiction which they denied.

"In reply to a question put by the Court, it was expressly affirmed by one of the counsel that, should the Common Council attempt, by an ordinance, and from motives manifestly corrupt, to convey, for a grossly inadequate, or merely nominal consideration, all the corporate property of the city, neither this, nor any other Court would have power to suppress, by an injunction, the meditated fraud, or when consummated to rescind the grant, or punish its authors, or divest them of its fruits. There could be no remedy, we were told, but from the force of public opinion and the action of the people at an ensuing election, and all this, upon the ground, that neither the propriety nor the honesty of the proceedings of a legislative body, nor while they are pending, even their legality, can ever be made a subject of judicial inquiry.

"This, it must be confessed, is a startling doctrine. We all felt it to be so, when announced,. and I rejoice, that we are now able to say, with an entire conviction, that, applied to a municipal corporation, it is just as ground-

less in law, as it seems to us, it is wrong in its principle, and, certainly would be pernicious in its effects."

"The doctrine, exactly as stated, may be true when applied to the Legislature of a State, which, as a co-ordinate branch of the Government, representing and exercising in its sphere, the sovereignty of the people, is, for political reasons, of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it true, when applied to a subordinate municipal body, which, although clothed to some extent with legislative, and even political powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice to legal process, legal restraint, and legal correction as any other body, or person, natural or artificial.

"The supposition that there exists an important distinction, or any distinction whatever, between a municipal corporation and any other corporation aggregate, in respect to the power of Courts of justice over its proceedings is entirely gratuitous; and, as it seems to me, is as destitute of reason, as it, certainly, is of authority. The counsel could refer us to no case, nor have we found any, in which the judgment of the Court has proceeded upon such a distinction, nor, in our researches, which have not been limited, have we been able to discover that, by any judge or jurist, the existence of such a distinction has ever been asserted or intimated. Were it otherwise—had such decisions been found in English reports, or in those of our sister States—had it been proved that in England, or other States, the supposed distinction is the established law, we should still be compelled to say that it is a law, which we must refuse to follow, for the plain reason, that it is directly inconsistent with the paramount authority of our own Constitution. The Constitution of the State declares, that 'all corporations shall have the right to sue, and shall be subject to be sued, in all Courts, in like cases, as natural persons.' (Con. Art. 8, Sec. 37.) There is no exception here of municipal corporations, and an exception which the Constitution has not

made, we have neither the inclination, nor the power to make ourselves."

"A corporation subject to be sued, is, necessarily, subject to every process, or order, that in the commencement, or in the progress, of the suit may be necessary to, or be connected with, the relief which is demanded. And the words 'in the like cases,' plainly mean, 'for the like acts, or omissions, and for the like reasons.'"

After further discussion and citation of authorities the learned judge adds: "The conclusion from these remarks is, that a court of equity will not interfere to control the exercise of a discretionary power, *where the discretion is legally and honestly exercised*, and it has no reason to believe the fact otherwise—but *will interfere, whenever it has grounds for believing that interference is necessary to prevent abuse, injustice, or oppression, the violation of a trust, or the consummation of a fraud.* It will interfere—and it is bound to interfere—whenever it has reason to believe that those in whom the discretion is vested, *are prepared illegally, wantonly, or corruptly to trample upon rights, and sacrifice interests, which they are specially bound to watch over and protect.*" (Case affirmed by the court of appeals, 9 N. Y. 264.)

So, the constitution of California provides, that "all corporations shall have the right to sue, and *shall be subject to be sued in all courts as natural persons.*" (Art. XII, sec. 4.) There is no exception of municipal corporations. They are but corporations, at best—their ordinances being but by-laws. The legislature of the state, as a co-ordinate branch of the state government, and the state itself cannot be sued, except by her express permission. (*Adams* v. *Bradley*, 5 Saw. 217; *Carr* v. *United States*, 98 U. S. 433.) I suppose this bill might just as effectually have been filed against the city and county of San Francisco, without making the mayor or supervisors, individually, parties at all. But the injunction would operate upon them as agents and officers of the corporation.

Many cases have been cited, wherein legislative bodies of cities and counties have been enjoined for gross abuses of their discretion, and for acts, apparently, within the general

scope of their powers, but rendered void as being *ultra vires* by reason of surrounding conditions, or extrinsic circumstances, or as violations of trusts, or as being, fraudulently, exercising their power. In many of these cases distinctions have been attempted to be drawn in considering the questions arising in the particular case, between acts strictly legislative, or strictly judicial, and those only *quasi* legislative or judicial, or acts partaking of both characters. It is difficult to reconcile all the cases upon such distinctions. But there are cases, wherein such bodies have no legal power to act, and their acts are void; yet, there is the *physical* power to do the act, and when done, physically, or actually, the injury, however irreparable, is accomplished. Or it may be that the contemplated action is the first step in proceedings, which the body is, physically, able, though not, legally, competent, to follow up to consummation. In such cases we can see no good reason, upon principle or authority, why a court of equity should not interpose at once, in a proper case, to prevent an irreparable injury, whether the void act by which it is to be effected be apparently legislative, judicial, or administrative; or whether it partakes of one or more of those characteristics. Suppose in this case, as a striking illustration, the board of supervisors were about to pass an ordinance directing a seizure of the Spring Valley Water Works, authorizing and directing, for instance, the superintendent of streets to take possession, and tear up the mains and pipes, and use the material for constructing other works for conducting water from other sources for the use of the city. Such an ordinance would be, manifestly, and, clearly, void, as being beyond their lawful powers—as being utterly *ultra vires;* yet there is the physical power, through the instrumentalities provided, to do the act; and if it should be sought to carry out the ordinance after its passage, the only adequate remedy would be *to restrain the waste* about to be committed by the superintendent of streets by injunction, as it would not be a simple trespass, but also waste. No remedy at law would be adequate, and as a court of equity must restrain it then, we can perceive no good reason why it should not interfere at one stage of the proceeding as

well as another—no objection sound in reason, or firmly established by authority, why the injunction should not be interposed at the first step to prevent the passage of such ordinance though absolutely void, that might eventuate in irreparable injury, as well as at the point where the superintendent of streets should begin to commit the waste under its assumed authority. As before said the supervisors would be acting without lawful discretion, or authority, of any kind. Its action would be *utterly lawless*, and only, apparently, legislative; yet an irreparable injury might result from the physical power to do the act assumed to be authorized, however void, or lawless. The test of jurisdiction, it seems to us, should and would be the necessary tendency, and, if carried out, the necessary result, of the void and unlawful act to work irreparable injury.

The special equitable grounds, relied on to entitle complainant to an injunction, assuming the fourteenth article of the state constitution to be void, are, that the passage of the ordinance will work irreparable injury; and, also, lead to a multiplicity of suits. It is difficult to see how irreparable injury, in a legal sense, can result from the passage of this ordinance, if void upon its face. If the ordinance is void, it is because the provision of the state constitution, under which the defendants are acting, is in conflict with the constitution of the United States, and, absolutely, void, on that ground. In legal contemplation, it is only necessary to compare the provisions of the two constitutions, to see whether they conflict, or not; and everybody is presumed to know the law—to know whether these instruments are in conflict or not. If the ordinance is, absolutely, void, it can give no right, and can cast no cloud over the rights of complainant. Such is the result of the authorities upon the subject, so far as affording a ground for interference by injunction is concerned. In *Bucknall* v. *Story*, 36 Cal. 71, the court says: "It has been settled from an early day in this state, and in accordance with the decisions of other states, that a court will not restrain a sale for taxes, or otherwise, where it is apparent, that the sale would be void on the face of the proceedings, upon which the purchaser must, neces-

sarily, rely to make out a *prima facie* case to enable him to recover under the sale. In such case, he has a perfect *remedy at law.* The principle is, that a proceeding which appears upon inspection to be void, constitutes no cloud." So, also, on page 74, the court says: "If the other points are well taken, however, the argument based upon them is *felo de se.* For if no constitutional, or valid assessment, and sale could be made under the law, or, if none was made, valid as against plaintiffs, for the reasons claimed, a sale could not affect them, or cloud their title; for the void character of the deed would, in like manner, be apparent without other evidence."

So in *Bucknall* v. *Story*, 46 Cal. 589, it is held that a payment of an assessment *void upon its face*, under protest, is a voluntary payment, not being under any *duress*, as everybody is conclusively presumed to know the law. *Wills* v. *Austin*, 53 Cal. 152; *Williams* v. *Corcoran*, 46 Id. 556; *Detroit* v. *Martin*, 34 Mich. 173, and *S. & N. P. C. R. Co.* v. *Dinwiddie*, decided at the last term of this court (8 Saw. 312), are to the same effect. In *Branch Turnpike Co.* v. *Supervisors of Yuba County*, 13 Cal. 190, complainant filed a bill to restrain the supervisors from fixing the rate of tolls to be charged over its turnpike road, an act entirely similar to that now in question. It was alleged in the bill that complainant "is an incorporated company under the law, and have, by virtue of their acts as corporators acquired certain vested rights to collect and fix the rate of tolls to be charged over their road. That defendants in violation of those rights, and without authority of law, are about to pass an order fixing the rate of tolls to be charged on said road, which order may entirely ruin plaintiffs, and cause them to lose the money invested in their enterprise."

The supreme court, reversing the judgment of the court below, which sustained the bill for an injunction, held, that "these allegations are wholly insufficient to warrant the interference of a court of equity"—that they do not show irreparable injury, and, said: "If the allegation of want of authority in defendants be true, *any order which they might make in the premises would be a mere nullity*, and could, in no

way, prejudice the rights of the plaintiff. On the contrary, if this allegation be not true, defendants should not be restrained from performing a plain duty." In *Burr* v. *Hunt*, a bill was filed to restrain the sale of land upon a tax void upon its face, and the relief asked denied, on the ground, that a sale upon a void tax could not injure the owner. The tax collector was alleged to be proceeding under a repealed act. The supreme court, Mr. Justice Field concurring, said, if "the tax collector is proceeding under that repealed act, it is difficult to see how any man's title could be clouded by force of any proceedings under it. The presumption of knowledge of a law passed, or a law repealing a former act, attaches to every citizen. (18 Cal. 307.) Again, "if the act of 1859 be *unconstitutional it creates no cloud upon the title;* if it be not, and the act embraces and validates this alleged assessment of 1857, then there is no pretense for an injunction." (Id. 308.) A similar principle is adopted in *Pixley* v. *Huggins*, 15 Cal. 133, 134, Chief Justice Field delivering the opinion of the court. And such is the principle established by numerous authorities. (See *Wells, Fargo & Co.* v. *Dayton*, 11 Nev. 167, and cases cited.) In *Leach* v. *Day*, 27 Cal. 644, a bill was filed to restrain a simple trespass, there being no waste, in laying out a road under the authority of the board of supervisors, alleged to be void, a perpetual injunction was granted. On appeal, the supreme court reversed the judgment, and said: "So far as the plaintiff's right to *equitable* relief is based upon the alleged invalidity of the acts of the board of supervisors, in laying out the road in question, the complaint is, manifestly, *felo de se*. If, as contended, those acts are absolutely null and void on their face, upon the ground that the act under which they were had is unconstitutional, it follows that they cannot hurt the plaintiff; for they have not even the appearance of legality; and, therefore, cannot affect or cloud in any manner his title. In such a case he has no need for an injunction, and, therefore, is not entitled to one."

It is said, that the passage of the ordinance, though void, gives a color of right, and through the fears of parties largely diminishes the value of the property. But such dim-

inution of the value of the property, if any there be, is the result of the fears of those dealing or wishing to deal in it, and are of a consequential nature. It is an incident entirely accidental, and is not the legal, or necessary, result of the void action of the Board of Supervisors. It does not follow, as a legal consequence. It is not, in contemplation of law, an injury. It may be an accidental, consequential damage, but in law, is damage without injury—*damnum absque injuria.* The ordinance does not propose to *take possession* of the water, or the water works, or to commit any waste. It does not interfere with it in any way, except to fix the price at which it is to be sold, which, on the assumed premises, is void. Assuming that the ordinance will be, absolutely, void, as claimed, we do not perceive why there will not be an adequate remedy at law. If it is void, the complainant, certainly, need not, furnish the water at the price, for there will be no law requiring it. In that event it can, only, be required, to furnish water at a reasonable price. We do not perceive, why the complainant has not the remedy in its own hands, by shutting off the water, as to those, who decline to pay a reasonable price, or by suing, and recovering, a reasonable price in a judgment at law. No one is bound to purchase at any price, unless he chooses to do so, and he is not entitled to be supplied, except at a reasonable price. The citizens can supply themselves from other sources, if they choose to do so. If an attempt is made to forfeit the works, under the last clause of the constitutional provision in question, it must be by suit at law, upon an information in the nature of a *quo warranto*, when, if the ordinance is void, it will be so adjudged—at least, that is the presumption of law, and that will settle the question. Any one suit at law, involving the question of the validity of the ordinance, carried to the Court of last resort, would settle the question as to the validity of the ordinance, and we do not perceive how the mere passage of the ordinance, would lead to a multiplicity of suits, in the sense of the law, which constitutes a ground for the exercise of equitable jurisdiction. Under the authorities, it does not appear to us that any recognized ground of

equitable jurisdiction for continuing the injunction is shown in the bill, affidavits, etc., upon which the case is submitted. There appears to be an adequate remedy at law, and in such case, this Court is expressly forbidden to sustain a suit in equity by Section 723 Revised Statutes of the United States. The writ of injunction is, sometimes aptly called, the "right arm of a Court of equity." We confess, we sometimes think, that in this class of cases, the "right arm" of the Chancellor is not quite so long as it ought to be.

It is a very severe rule, that requires all parties to take notice, whether a statute, or a provision of a state constitution, is valid, or not. The legal presumption, that every party knows what the law is, cannot possibly be realized in fact, or in practice. How is it possible, upon questions which are open to discussion, that a litigant can unerringly determine in advance, what the opinion of three, five, or nine men, however eminent they may be, constituting the Court of last resort will be, when the judges themselves often take adverse views, and sometimes determine the question by a bare majority, as five to four, or "eight to seven." A judgment is even sometimes affirmed upon an equal division of the judges in the Appellate Court. It seems a severe rule that in questions of the highest importance, the party must, at his peril, determine in advance what the ultimate decision of the courts will be. Sometimes damages little short of absolute ruin may result from an erroneous determination; and this case affords a striking illustration of what the consequences of error may be—the forfeiture of all their property, of several millions in value. Yet the length of the Chancellor's arm is limited in this particular, by well-settled principles which we are not authorized to overthrow, or disregard. If, therefore, the provision of the state constitution in question is, absolutely, void, on its face, there is no equitable ground for enjoining the passage of the proposed ordinance, and the injunction must be denied on that ground. If valid, the passage of the ordinance is within the authority of the supervisors, and, of course, ought not to be restrained.

The duty of deciding whether a state statute, or constitu-

tional provision is void, as being in conflict with the national constitution, is, always, one of the most delicate nature. Yet it is a duty, however delicate, which the proper courts are, sometimes, compelled to perform. The unconstitutionality of a state statute, or constitutional provision, must, very satisfactorily, appear, in order to justify, even the court of last resort, in declaring it void. This is the united voice of all the authorities upon the subject. *A fortiori*, is this true of a subordinate court of original jurisdiction. Whatever our opinion might, otherwise, have been, in view of the authoritative decisions of the supreme court of the United States in the Elevator case, and the Railroad cases, immediately following it, all of which are known as the Granger cases, and in the Sinking Fund cases, can we, properly, say, without reasonable doubt, that the provision of the state constitution in question is void, as being in conflict with the several provisions of the national constitution invoked? After mature consideration, we do not think we can. In the Elevator case, Messrs. Munn & Scott, two citizens of Chicago, Illinois, having erected upon their own land, held, as other lands in Chicago are held, in private ownership, an elevator for the storage of grain for hire; received such grain as parties desiring its storage offered, and charged such prices as they and other proprietors of elevators agreed upon and fixed, and as parties storing grain were willing to pay, and did pay, for such storage. The new constitution of Illinois declared that, "all elevators, or structures where *grain or other property* is stored for a compensation * * * are declared to be public warehouses." So that the provision extends to *all warehouses*, where *any kind of property is stored*. The legislature of Illinois passed an act regulating storage in the several classes of warehouses; and among other things, established a limitation upon the price for storing grain, at a sum less than that charged by Munn & Scott, and other proprietors of elevators, and paid by their customers; and made it a penal offense to charge a higher rate than that limited. Being criminally charged, and convicted, under this act, an appeal was taken to the supreme court of Illinois, where it was in-

sisted by Munn & Scott, that the statute of Illinois was void, as being in conflict with the third clause of section 8, article 1, the sixth clause of section 9, article 1, and of the fifth and fourteenth amendments of the constitution of the United States; all of which points were overruled by the supreme court of Illinois. That decision was affirmed on writ of error by the supreme court of the United States. Munn & Scott received no franchise, or grant, or anything else from the state of Illinois, as a consideration upon which to base this restrictive legislation. They were, simply, the private owners of land, and like other owners of private property, erected elevators upon it, and devoted it to storing grain, for such persons as chose to patronize them, and upon terms agreed upon. Munn & Scott claimed, that, as they owned the property, had asked and received nothing from the state, they were entitled to use it as they pleased for any lawful purpose, and to fix their own price for the use of it; that people could use it, or not, upon the terms offered, as they pleased. The people of Illinois, through their representatives, fixed the price of storage. Doubtless, many of the members of the legislature itself, were among the patrons of the elevators—at least they are likely to be, as Illinois is an agricultural state, and many agriculturists and dealers in grain and other agricultural products, producers of these articles who were, also, interested in the price of storage, as it affected the market price of the products, must have been among these members. At least, the members must have represented those storing grain and interested in storing grain in the elevators at Munn & Scott, if they were not, personally, their patrons. Thus the price of storage, under the law, was fixed by the persons using the warehouses of Munn & Scott, either, directly, as members of the legislature, or as being representatives of those who used them, in the same way, and in the same sense, as the supervisors being consumers, and representatives of the consumers, of the Spring Valley water, fix the price of that commodity. The principle, as applied to grain elevators, applies to all other warehouses storing any kind of property. We are unable to distinguish this case from the Elevator case, or

take it out of the rule laid down by the supreme court in that case. The only ground of distinction relied on by complainant, is, that in the Elevator case, the legislature only fixed the price of the *use* of the warehouse, while the board of supervisors fix the price of the commodity itself, and take the whole. We cannot perceive that this difference affects the principle upon which the decision rests. It simply goes to the degree of the interference, and not the principle. The right to the use of property is one of the essential elements of property. The use is a part of the property. The man who leases property, or acquires the right to its use, has an interest, or estate in it, to the extent of his right, whether it be of a longer, or shorter, duration—an absolute, or qualified, right of use. To the extent of his interest, the right to the use of a thing, is as much a right of property, and is as sacred, as the right to the *corpus* itself. An elevator erected at great cost can only be of use for storage of grain, or other goods, and to fix the price at such a sum that it will not pay actual expenses, would render the property valueless, and be, as directly, a destruction of the property itself, as if it were taken into possession, or otherwise appropriated. The *continued* use makes up the whole value of the thing itself. The only value in water, as in an elevator, is in its use—in its availability to contribute to the advantage and enjoyment of the owner. To fix the value of its use, for domestic and other purposes pertaining to the supply of water to cities, is, necessarily, to fix the price of the *corpus* of the water. So, also, to fix the price of the storing of grain, or other commodities, is, as necessarily, to fix the value of the elevator, or warehouse, itself, in which it is stored. We are unable to, satisfactorily, take this case out of the decision in the Elevator case.

We find ourselves equally unable to, satisfactorily, distinguish this case from the sinking fund cases. The Union and Central Pacific Railroad Companies built their roads, and put them in operation in all respects as required by the terms of the contract contained in the acts of congress under which they were constructed; and they earned the rights and compensation which they were entitled to receive under

their contract with the government. The contracts had ceased to be executory, and had become fully executed, except as to the future operation of the roads, and the performance of the current services required by the government after completion, for the stipulated compensation. But this was a distinct contract for the use of the road after completion. The rights of the company had become fully vested under the contract. Yet congress passed an act changing, materially, the conditions and rights to which these companies had become entitled. Instead of putting one half of the earnings from transportation of freight required by the government, and five per cent. of the net earnings of the roads, into a sinking fund, as, originally, provided, they were required by the new act, without the consent of the other parties to the contract, to put the whole of such earnings, and twenty-five per cent. of the entire net earnings of their roads till it should reach a specified amount, into that fund. Yet the supreme court held that it was competent for congress—one of the parties to the contract—without the consent of the railroad companies—the other parties—to make this modification; and that this legislation was entirely constitutional under the powers reserved in the act to "alter and amend." The court said: "We think it safe to say, that whatever rules congress *might have prescribed* in the *original charter* for the government of the corporation in the administration of its affairs, *it retained the power to establish by amendment.* In so doing, it cannot undo what has already been done, and it cannot unmake contracts that have already been made, *but it may provide for what shall be done in the future; and may direct what preparation shall be made for the due performance of contracts already entered into.*" (99 U. S. 721.) And it did make requirements not contained in, and far more onerous than, those provided for in the original act. It is conceded that the legislature, in the act of 1858, under which the complainant was organized, might have legally incorporated the present provision of Article XIV of the state constitution, and that the company would, then, have been compelled to accept the terms offered as a condition of organization, and pursuing its calling. It must have

accepted the terms, or not have organized. If, then, it be true, as said by the supreme court in the Sinking Fund cases, that congress was authorized under the power of amendment retained in the act, to insert, as a condition of the future continuance of existence, and of pursuing the proper business of the corporation, any provision that it might have, originally, inserted in the act, it is difficult to see why the amendment in question to the act constituting the foundation of complainant's charter, is not, also, authorized under a similar reservation in the old constitution of California under which the act of 1858 was passed, the provision being: "All general or special acts passed pursuant to this section may be altered from time to time or repealed." (Old Const., Art. IV, sec. 31.) Language broader in its scope than that employed in the act of congress incorporating the Union Pacific Railroad Company, and the acts amendatory thereto.

In the Sinking Fund and Granger cases, three justices dissented, but the judgments had the concurrence of a majority of the court, and, whether right or wrong, they are law to this court. We are unable to take this case out of the rules established by those cases.

It is well known, and it was conceded at the argument, that a case in which the complainant is appellant, presenting the precise constitutional questions we have been considering, was submitted to the supreme court for decision on printed arguments, under the rules of the court, at the October term, 1881, of that court; that upon examination, the court, not being satisfied as to what the decision should be, set aside the submission; and ordered a reargument at the present term. Knowing these facts, and pending this case, it would be little short of presumption in us, in advance of the decision of the points in that case, to hold that the unconstitutionality of Article XIV of the constitution of California, so satisfactorily, appears, as to justify us in declaring it void; and, on that ground, grant the injunction sought, especially, as this court could as well interfere by injunction afterwards, to prevent the execution of the ordinance, as now to prevent its passage, should it be held by the supreme court to be void. Besides, the supreme court of California

upheld the provision of the state constitution in question in *Spring Valley Water Works* v. *The Board of Supervisors of San Francisco*—the case now before the supreme court of the United States. (7 Pac. Coast Law Journal, 614.)

While the decisions of the supreme court of the state are not controlling in the national courts upon questions, as to whether state laws and constitutions conflict with the constitution of the United States, they are, certainly, entitled to the very greatest respect; and where that court sustains the constitutionality of a law, and the supreme court of the United States itself, hesitates, it can hardly be expected, that we should be swift to say, that the provisions in question are, so clearly, unconstitutional, as to justify us in declaring them void, for the purpose of granting the provisional remedy of an injunction before a final hearing of the case.

It is insisted that the anti-election pledges of the members of the board of supervisors, set out in the bill, disqualify them from acting in fixing the water rates; and that the injunction should be granted on that ground. We do not conceive, that we are authorized, in this collateral way to inquire into the personal qualifications of the several members of the board of supervisors, to sit as members of that board, generally, or in particular cases. They are regularly elected, accepted, and qualified members of the board, and are acting as such in pursuance of the laws organizing said board providing for the election and qualification of its members. We have no jurisdiction to review the subject of their personal qualifications. Being members, they are authorized to perform such duties, as, legally, come within the purview of the authority of the board. But suppose it were otherwise, we are, still, thrown back upon the question already discussed—the constitutionality of the provisions of the state constitution, under which the supervisors are assuming to act. If it be competent at all, under the provisions in question, for the people of San Francisco, through their representatives, in the board of supervisors to pass the proposed ordinance, and they had determined to do so, it is difficult to perceive, why, in look-

ing around for agents, or representatives to carry out their will, it is unlawful to ask, in advance, whether those seeking to represent them will obey their command in these particulars, or to require a pledge to that effect before committing the trust to them. We suppose a banker, or any other business man, about to appoint a cashier, or other agent, would be entitled to require a pledge of the applicant for appointment, to transact the business in accordance with the views of the principal, rather than follow his own ideas of what should be done. It may be, that it would be more conducive to the public interests, and better comport with his own personal dignity, if a candidate for employment in some great public legislative trust, would decline to pledge himself, further than to examine every question presented for legislative consideration, fully, and fairly, in the light of all attainable information, and then act in accordance with the dictates of his best judgment as to what the public interests really required. But this is not the question presented for our consideration. It is a question as to what the people are authorized to do, through their representatives, and what they are, lawfully, authorized to require of those seeking to represent the people under the provision of the constitution of the state in question. This is not like the cases cited of candidates, who promise to serve without salary, or compensation, in case of their election. That is palpable bribery—an offer to purchase an election for a money consideration—not a mere expression of coincidence of opinion and promise of co-operation with the constituent in securing a lawful object. It makes no difference, whether the candidate offers the gross sum of his salary to his constituents in a body, or, whether, he takes his salary in the usual way, but before the election, uses an equal amount of money in buying up individual votes at small sums each. One mode of buying votes is, in effect, as, clearly, bribery, as the other. But conceding the right of the people to do the act pledged through their representatives, the act now under consideration is simply requiring in advance of his appointment, a promise from the agent or representative, that he will do what the principal

is authorized to do, and what he would do himself, if he could act in person. And the only question for us to consider, is, is such a pledge illegal, in such sense, that a court can say it will vitiate all his acts within the purview of his pledge? We cannot say that it is.

It is urged, with great earnestness, and ability, with an abundant citation of authorities, bearing upon the point; that the city itself, whose mouth-piece the Board of Supervisors is, is the largest consumer of water furnished by complainant, and that the members of the Board, personally, and the people whose agents they are, are the consumers of the remainder; that the vendees, therefore, alone, fix the price of the commodity purchased, and which complainant is compelled to sell; that the action is judicial in its nature, not legislative, and that upon the well-settled principles of individual and public rights, independent of all legislation, and constitutions, one cannot sit as judge in his own case. If the validity of the Constitutional provisions depended upon the distincion between judicial and legislative action, still, fixing the price of water for the future, can hardly be called strictly, or, purely, judicial. The action of the Board, is, to establish a rule for future guidance, not to determine whether past transactions are governed by a rule before established, and adjust the rights of the parties in accordance therewith. The proposed action would, certainly, seem to partake in part, at least, of the quality of legislation. It may require inquiry, and the exercise of judgment, to enable the Supervisors to act intelligently, but that is true of all legislation. Most acts of such deliberative bodies involve action in some sense of both a judicial and legislative character. But we need not seek for any nice distinctions in these particulars, as we must go back to the main question, at last, and doing that, we find the case covered by the Granger and Sinking Fund cases, already considered. In the first, the price of the services performed by private parties, deriving no rights from the State, with their own means and property, was held to be properly fixed through their representatives by the parties receiving the service; and in the latter, under the reserved power to repeal, and amend,

that vested rights of one party under an executed contract, with reference to the future, might be modified by the other party to the contract—said party being in a similar sense, a judge in his own case. It can make no difference in this case, that the power to fix the rates is vested in a municipal body, instead of the state legislature, because it derives the authority to fix them from the state constitution, directly, from the sovereign power, and not by a redelegation of delegated power by the legislature. This objection that a person cannot be a judge in his own case was not, accidentally, overlooked; for it was expressly pressed upon the attention of the Court by Mr. Justice Field in his dissenting opinion. Citing the case of *Calder* v. *Bull*, decided so long ago as 1789, and quoting from the opinion of the Court rendered by Mr. Justice Chase, he said: "In *Calder* v. *Bull* * * * Mr. Justice Chase said, 'that there were acts which the federal and state legislatures could not do without exceeding their authority;' and, among them, he mentioned a law which punished a citizen for an innocent act; a law that destroyed or *impaired the lawful private contracts of citizens; a law that made a man a judge in his own case;* and a law that *took the property from A, and gave it to B.* 'It is against all reason and justice,' he added, 'for people to intrust a legislature with such powers, and, therefore, it cannot be presumed that they have done it. They may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that a federal or State Legislature possesses such power if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in all free republican governments. 3 Del. 388.'" (99 U. S. 765.)

The act under which the complainant was incorporated, and in pursuance of which, it executed its part of the contract by introducing into the city pure fresh water at an expense, as is claimed, of from ten to fifteen millions of dollars, provided, that the rates to be charged should be fixed by a board of commissioners to be selected, "two by such city

and county, * * * two by the water company; and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of the board; if the four commissioners cannot agree upon a fifth, then the *sheriff of the county* shall appoint such fifth. The decision of the majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established." Even under this arrangement, which gave complainant a voice in fixing the price of the commodity furnished by it for the use of the city and its inhabitants, the advantage was on the side of the public, as, in case of a disagreement of the representatives of the two parties to the contract, the umpire was appointed by one of the principal officers of the municipality, whose position was, wholly, dependent upon the votes of the consumers. By the provision of the state constitution in question, adopted after the complainant had expended large amounts of money in executing the contract, and its rights, whatever they were, became vested, it was provided, that the rates of compensation to be collected for the use of water supplied to any city and county, or city, or town, or the inhabitants thereof, "shall be fixed annually, by the board of supervisors * * * of such city and county."

And it was, further, provided, that: "Any person, company, or corporation, collecting water rates in any city and county, or city, or town, in this state, *otherwise than as so established, shall forfeit the franchise and water works of such person, company, or corporation, to the city and county, or city, or town, where the same are collected, for the public use.*" It would seem to be only necessary to make this brief statement of the case, to enable one of ordinary intelligence, endowed with a reasonable share of moral sense, to perceive, the monstrous injustice of thus placing the large investments of complainant, made under the stimulus of the inducement held out by the act of 1858, at the absolute mercy of an irresponsible public sentiment, or of public cupidity. This last provision would seem to offer a large premium for the perpetration of a wrong—a large inducement to the purchaser—the consumer—to fix the price at

unremunerative rates, in order to secure the large property by forfeiture and confiscation, or to so largely diminish its value, as to force a sale to the city at a price far below its real value. It was alleged in the argument, and not denied, to be a matter of public history and public notoriety, of which we are authorized to take notice, that such designs have been, openly, and, publicly, avowed, and advocated by public speakers. It is no answer, sound in morals, or honest in a business point of view, whatever it may be in law, to the wrong complained of by the complainant, that if it does not like the conditions of its future existence imposed upon it, by article XIV of the state constitution, it can withdraw from this field of enterprise. It cannot withdraw without a sacrifice of its large investments, nor can it suspend its operations for a single day, without inflicting untold misery upon a large population, and it might involve the destruction of the city. Its investment is useful, and valuable for no other purpose, than to supply water for the use of the people of San Francisco. To fix the price at unremunerative rates, is to confiscate the property.

When the supreme court, in the Sinking Fund cases, said, "whatever congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment," it added, "in so doing *it cannot undo what has been already done; and it cannot unmake contracts that have already been made.*"

It is urged, that this reservation embraces the case of the Spring Valley Water Works, now under consideration; that the contract under the act of 1858 gave the complainant a voice in fixing the price of water, while the constitutional provision in question takes it away and gives the power to fix the price to the purchaser of the water alone; and that there is no limit on its power to reduce the price; that a reduction to an unremunerative rate, which is claimed to be contemplated, would render it impossible to pay its debts, or continue the supply of water; and that the result would be a confiscation of the large investments made; that these investments constitute what "*has been done*" under

the contract; and, that by this means to deprive the company of its capital so invested, and of the rights which have become vested under the contract of 1858, which has become fully executed on the part of complainant, is, not only to impose further conditions upon its future existence, and the further exercise of its functions, but is to *unmake contracts* that have already been made, and have already been executed, and undo what has already been done; that, although, it is not bound to accept the new conditions imposed, but may dissolve and retire from business rather than submit to such conditions, yet, to retire, is to sacrifice its large investments, as they are available for no other purpose; and would be as ruinous, as to go on at a loss. To us there appears to be very great force in these propositions, and, if these were new questions, this argument would, certainly, be entitled to most serious consideration. But the Sinking Fund cases involved, substantially, the same conditions, and they are, therefore, controlling. If congress in those cases, after the contract had been executed, and the rights of the corporations had become vested under it, could require them to pay into the treasury for a sinking fund, the whole of the earnings for freight carried for the Government, when the original contract only required half; and pay into the treasury twenty-five per cent., of their net earnings, when such contract, only required, five per cent., it is not easy to perceive, why it could not require a similar payment of all their net earnings, or even of the gross earnings. The right to demand half, or one quarter, involves the right to demand all.

Chief Justice Marshall says, "the power to tax involves the power to destroy." So, as there is no limit, the power exercised in the Sinking Fund cases, involves the power to destroy. Should the amount demanded be so great as not to leave sufficient money to enable the companies to operate their roads, and require suspension, their property would, to all intents and purposes, be as effectually destroyed as if wholly taken, and appropriated to public use, or blotted out of existence. They could no more decline to accept the conditions, upon which their future existence, and the future

operations of the roads depended, without a sacrifice of all that had before been invested, and acquired, under their contracts, than could the Spring Valley Water Works. Their property would be of no use or value, except for railroad purposes; and if it could not be used for that purpose, by reason of the onerous conditions imposed by congress under its unlimited power to amend, it would be equivalent to its loss. There would be an undoing of what "had been done," by making investments under it, and unmaking a contract that "had already been made" in the same sense, as is claimed in the case of the Spring Valley Water Works.

The conditions of the two cases appearing to us to be, precisely, similar in these particulars, the decision in the Sinking Fund cases must govern us on this point, also. If those decisions are to be in any way qualified, or limited, it can only be done by the supreme court itself. If this provision of the state constitution should be finally sustained by the supreme court of the United States, there are but two courses for complainant to pursue—either to submit to such wrongs, as may be imposed, from time to time, at the demand of the people, or sacrifice its investment and retire from the field, unless the power should be exercised in so outrageous a manner as to call upon the courts to interfere in some mode, if any there be, to protect it on the ground of fraud, oppression, or gross abuse of power. In this case, also, the power to fix the price of water is the power to destroy, and that power is now, by the terms of the state constitution, vested in the purchaser alone. The complainant may, pertinently, repeat the question of the great Chief Justice: "Is this a case for confidence?" We refer to this matter, not as intending to express an opinion, that the action at present contemplated, will, in fact, work a great wrong to the complainant, as we are not now sufficiently advised on that point, to determine the question; but to call attention to what may be done under the power, in obedience to an excited popular sentiment, should the validity of the provision in question be ultimately sustained. The complainant alleges in the bill, that the reduction contemplated in the proposed ordinance, will be so great as to, ruinously, af-

fect its property; and, indeed, it is claimed, in the argument, that under the circumstances, the establishment of the rates as provided in the ordinance, will constitute an abuse of discretion calling for judicial interference. But this application is made, and rests on the bill, alone, unsupported by other evidence, and the facts on this point are distinctly met by a denial by the affidavits of the defendants. This is a sufficient answer to the application for an injunction, if the court is authorized to interfere on that ground.

We are, therefore, not called upon to determine, at present, whether the prices contemplated are so low, as to constitute an abuse of the discretionary powers of the supervisors, assuming the constitutional provision under which they are acting, to be valid, when properly executed, or, if an abuse of their discretion, what relief it is competent for the court at this, or any other stage of the proceedings, to afford. To determine this question now, would be to decide the case before hearing the evidence.

We believe we have disposed of all the points relied on by complainant. For the reasons stated, an injunction must be denied, and it is so ordered.

The preliminary restraining order, issued to preserve the rights of the parties in *statu quo*, till the merits of the case presented by the bill could be considered and determined, having performed its office, it is now dissolved.

HOFFMAN, J., concurring. By the act of 1858, under which the company went into operation, it was authorized to charge reasonable rates, to be fixed by arbitration, as therein provided. By the fourteenth article of the constitution of 1879 the board of supervisors was authorized and required to fix the rates. The complainant contended that this article was void. 1. Because it impaired the obligation of a contract. 2. Because it sought to take property for public use without compensation. 3. Because it deprived the company of its property without due process of law. Many other questions were raised and elaborately argued at the bar. The validity of article XIV is the only question discussed in this opinion.

In *Munn* v. *Illinois*, and the other cases known as the Granger cases, the supreme court of the United States has decided that whenever private property is affected by a public use, or whenever a private individual devotes his property to such uses as to create an interest in those uses on the part of the public, the public, through the legislature, may determine the compensation he shall charge for the use of his property. And this, notwithstanding that the owner is not a corporation, possesses no franchise, and exercises no rights, except such as are incidental to the ownership of property. "When, therefore," says the court, "one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control." It will hardly be urged that the poor privilege of escaping the control by discontinuing the use is available to a company upon the use of whose property the inhabitants of a large city depend for their daily supply of water.

In the Granger cases it was held that fares and freights of railroads may be fixed by legislation, even in cases where the charter gave the company the right to establish and charge such rates of fares and freights as *it* should deem reasonable, and that the right reserved in the charter or by general law "to alter and repeal," gave to the legislature the authority *by subsequent amendment to prescribe any rules for the government of the corporation in the administration of its affairs which it might have prescribed in the original charter.*

It has also been held by the supreme court that the right reserved by the constitution of a state to alter and repeal all laws creating corporate privileges is an inalienable legislative power, and that this power cannot be limited or bargained away by any act of the legislature, because the power itself is beyond legislative control. (*New Jersey* v. *Yard*, 95 U. S. 3.) The effect of these decisions is attempted to be avoided by the suggestion that in the Elevator case the legislature merely regulated the use of the

property, but did not attempt to touch the property itself, while the constitution of this state, and the ordinance it directs to be enacted, fix the price at which the complainant's property, viz., the water it owns, shall be furnished. But this distinction between taking property and depriving its owner of its use seems metaphysical and illusory. The value of all property consists in its use and beneficial enjoyment. The right of property is as substantially invaded by restricting its use as by appropriating it. What remains of the right of property of a landlord if he is forbidden to charge rents to his tenants, and if the same prohibition extends to those to whom he may sell it? Is not the right of property in a coat destroyed if the owner is forbidden to wear it, or if onerous restrictions are imposed upon its use? If, then, the legislature may lawfully fix the price which the owner of certain kinds of property may demand for its use, they may fix it at such rates as will amount to its practical confiscation, and in effect will deprive him of the property itself, although, technically speaking, the title may be untouched.

2. The only use which the complainant can make of the water it owns is, except so far as the shareholders may apply it to their own individual consumption, to distribute and supply it to consumers in this city. They use it for this purpose, and the right to receive compensation for this use alone gives value to their property. When, therefore, the price they are to receive is made the subject of legislative regulation, the use of the property is regulated to the same extent and in a similar way as the use of the elevators was regulated by fixing the price to which their owners were to charge for the use of those structures. The title of the company to its dams, its reservoirs, its areas of catchment, its pipes and its pumping apparatus, are not touched by the proposed ordinance. It is only when the water is brought into the city and sought to be used by supplying it to consumers that the ordinance proposes to regulate that use by fixing the rates to be charged. The soundness or justice of the principles established by the supreme court we are not at liberty to dispute or discuss. Our duty is to obey, and

to attempt, while admitting the authority of the case of *Munn* v. *Illinois*, to take this case out of the operation of the principles laid down in it by virtue of the distinction suggested, would, it seems to me, be a sophistical, if not a disingenuous evasion of our duty. If the doctrine of that case and of the Granger cases and of the Sinking Fund cases are to be overturned or modified, it must be by the supreme court, not by us.

It is claimed that the law of 1858, which provided that the *reasonable rates* which the company was entitled to charge should be fixed in a specified mode, viz., by arbitration, was in the nature of a contract, the obligation of which cannot be impaired by subsequent legislation. But this position seems to be untenable under the decisions of the supreme court in *Peck* v. *Chicago and N. W. Railroad Company*, 94 U. S. 164. In that case the railroad company was, by its charter, authorized to receive such sum or sums of money for the transportation of property or persons as it should deem reasonable.

The constitution of Wisconsin, in force when the charters were granted provided that all acts for the creation of corporations within the state might be altered or repealed by the legislature at any time after their passage. It will be seen that the circumstances of this case are even stronger than those of the case at bar. By the charter of the railroad company not only was the mode of determining what should be a reasonable compensation provided for, but the right to make that determination was expressly conferred on the company itself.

It was urged, and with greater plausibility than in the case at bar, that this provision of the charter was in the nature of a contract, the obligation of which could not be impaired by the legislature, and, were it otherwise, the will of each succeeding legislature, and not the contract, would determine the rights and obligations of the company. That the act of the Wisconsin legislature, so far from leaving the material property and rights of the corporation inviolate, took from it the income, and thus as effectually deprived it of the beneficial use of its property and the means of fulfilling its en-

gagements with its creditors as if the road had been confiscated. That there was no substantial difference between a law which diminished the income of a company by thirty per cent., by reducing its tariff or rates and one which requires it to pay thirty per cent. of its rates to the treasurer of the state, to be by him distributed among those who paid fares or freights to the company,

It was therefore contended that the legislation in question was unconstitutional, because it impaired the obligation of a contract—because it took property for public use without due compensation, and because it deprived the company of its property without due process of law, and that the reservation of the right to alter or repeal acts regulating corporations conferred no power to violate these fundamental constitutional provisions. It will, I think, be difficult to distinguish the case of the complainant and the grounds on which it is rested from the case thus presented to the supreme court.

The court held that the privilege of charging whatever rates it might deem proper was a franchise which might be taken away under the reserved power; that the right to fix a reasonable compensation for the use of property which has been clothed with a public interest rests with the legislature, and that its determination binds the courts as well as the people. "If it has been improperly fixed, the legislature, and not the courts, must be appealed to for the change." (94 U. S. 178.)

In *Tomlinson* v. *Jessup*, 15 Wall. 457, the supreme court says: "It is true that the charter of the company when accepted *constituted a contract between them and the state, and that the amendment when accepted formed a part of the contract from that date, and was of the same obligatory character.* And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the state by the

law of 1841 *authorized any changes in the contract* as it originally existed, or as subsequently modified, or its entire revocation. The original corporators or subsequent stockholders took their interests with knowledge of the existence of this power and the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state *control* over *its contract* with the corporators, which without that provision would be irrepealable, and protected from any measures impairing its obligation." (Per Field, J.)

It will be observed that the existence of a *contract* is here expressly admitted by the supreme court, but it declares that "power reserved (viz., to alter or repeal) authorized any change in the contract as it originally existed or as subsequently modified, or its entire revocation."

In his dissenting opinion in the Sinking Fund case (99 U. S. 749) Mr. J. Bradley says: "By reason of the reserved power to alter and repeal a charter this court has sustained legislative acts imposing taxes from which the corporation by the charter was exempted * * *; a reservation of the right to legislate, or which is the same thing, to alter, amend, or repeal the charter, necessarily includes the right to resume taxation. *The same observations apply to the regulation of fares and freights*, for this is a branch of the police power applicable to all cases which involve a common charge upon the people."

I am unable to see how the force and application to this case of these judgments of the supreme court can be ignored or evaded. Whether the rates proposed to be established by the supervisors in this case are reasonable, we have neither the means of judicially knowing, nor the right, in this proceeding, judicially to inquire. If, as alleged in the bill of complaint, it be true that the proposed reduction of

rates will so diminish the income of the company as to render it unable to pay the interest on its indebtedness, and to maintain and complete its system for the water supply of this city, its inhabitants may hereafter have cause to lament that the completion of that system, now seen to be indispensable as a security against the horrors of a water famine, has been rendered impracticable.

Whether the deprivation of all voice or right to be heard in the establishment of its rates and the conferring of that right on the representatives of the consumers exclusively, thus making them "judges in their own cause," is a reasonable or just mode of determining what rates the company shall or ought to pay, is a question we are not at liberty to consider. That the right conferred upon the supervisors might, in unscrupulous hands, be abused, is obvious. By successive reduction in the rates the property might be virtually confiscated—or its value so far impaired that the city might acquire it at a price practically fixed by its own legislation. It would seem, under the authorities cited, that the only remedy for so great a wrong is to be sought "at the polls."

But even if I am mistaken in the view I take of the principles laid down by the supreme court and of their controlling authority in this case, it is nevertheless obvious that in presence of a decision of the supreme court of this state affirming the constitutionality of Article XIV of our constitution, and in view of the hesitation and embarrassment felt by the supreme court in coming to a decision upon the identical question now submitted to us, we cannot affirm the unconstitutionality of that article to be so clear and free from doubt as to authorize us to interpose in the manner prayed for in the complaint.

ELIZABETH PROEBSTEL *v.* H. A. HOGUE, JOHN CATLIN, JOHN MUIR, AND PHILO HOLBROOK.

CIRCUIT COURT, DISTRICT OF OREGON.
MARCH 9, 1883.

1. DONATION TO MARRIED PERSONS UNDER SECTION 5 OF THE DONATION ACT.—Upon the death of a married donee, intestate, under section 5 of the donation act (9 Stat. 497), after compliance with the act, and before the issue of a patent, the share of the deceased in the donation descends to his or her heirs, under the local law of descents (Or. Laws, 547), and is not affected by the provision in section 4 of said act, giving the share of a married donee, dying under like circumstances, to the survivor and children, or heirs of the deceased, in equal parts.

Before DEADY, District Judge.

George H. Williams, for plaintiff.

Joseph N. Dolph and Benton Killen, for defendants.

DEADY, J. This action is brought to recover the possession of the north half of the Wendell Proebstel donation, the same being situate in Multnomah county, and consisting of parts of sections 27 and 28 of township 1 north, of range 1 east, and containing about one hundred and sixty acres, alleged to be of the value of six thousand dollars. From the complaint it appears that Wendell Proebstel, on November 15, 1852, settled upon the donation in question, under the donation act of September 27, 1850 (9 Stat. 497); and that at the time he was married to Jane Proebstel, and otherwise qualified to become a married settler on the public lands in Oregon, under said act; that in May, 1853, he filed his notification and preliminary proof of said settlement, and on July 27, 1857, made his final proof of four years' residence and cultivation; that on March 31, 1866, a patent certificate was issued to him designating the north half of the donation as inuring to his said wife Jane, and the south half to himself, and on August 30, 1871, a patent was issued for the same in accordance therewith.

In June, 1867, said Jane died intestate, "without ever

having had any children, and leaving no lineal descendants and without any kindred in the United States, but leaving her said husband surviving and in possession of said land;" that on November 18, 1868, and while said Wendell was in the possession of the donation, the plaintiff was married to him, and went to reside on the premises, where they remained until July 7, 1874, when said Wendell died intestate, "no children ever having been born to him, and leaving no lineal descendants," and leaving the plaintiff in the possession of the donation, where she remained until April 19, 1879, when the defendant Hogue wrongfully dispossessed her of the north half thereof, and together with his co-defendants now wrongfully withholds the possession of the same from her.

The complaint then alleges "that by virtue of the provisions of said act of congress and the statutes of Oregon regulating the descent of real property" the plaintiff "became, upon the death of her said husband, and now is, the owner in fee of the property wrongfully withheld from her by the defendants as aforesaid;" and "that she is entitled to the present possession of said property—the same never having been sold or conveyed by, through, or on account of the said husband."

The defendant Philo Holbrook, answering, disclaims any interest in or claim to the possession of the premises; and the defendants Hogue, Catlin, and Muir demur to the complaint, for that, the court has no jurisdiction and the facts stated do not constitute a cause of action. Jurisdiction is not claimed in this case on account of the difference in the citizenship of the parties, who are all understood to be citizens of Oregon. But it is claimed upon the ground that the suit arises under a law of the United States, to wit: the donation act of September 27, 1850, *supra*, under which Proebstel settled upon and occupied the premises.

The first section of the judiciary act of March 3, 1875 (18 Stat. 470), confers upon the circuit courts of the United States jurisdiction "of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, ex-

clusive of costs, the sum or value of five hundred dollars, arising under the constitution or laws of the United States."

In *Railway Co.* v. *Mississippi*, 102 U. S. 141, Mr. Justice Harlan, speaking for the court, says: "That cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right, or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted;" and he adds: "That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States." To the same effect is *Bybee* v. *Hawkett*, 6 Saw. 598, decided in this court.

The claim of the plaintiff in this case is that upon the death of Jane after the compliance by Wendell with the requirements of the Donation act, and before the issue of the patent, the Donation act gave her share in the donation to said Wendell, and that thereafter, upon the death of the latter, it descended to her under the laws of Oregon. (Comp. 1874, 547). And it is based upon the assumption that the express provision to that effect in section 4 of the Donation act, concerning a married settler thereunder, is or ought to be held equally applicable to the case of married persons claiming under section 5 of said act, as Wendell and Jane, and also the conclusion, which might very properly have been alleged in the complaint, that by operation thereof Wendell took Jane's share in the donation upon her death. Admitting this, it is not disputed that the plaintiff, upon the death of the former, succeeded by descent under the laws of Oregon, to the premises.

But the proposition that Wendell succeeded to Jane's share in the donation is denied by the demurrer—the defendants contending that upon the death of Jane, such share was no longer within the operation of the Donation act, but that the same descended to her heirs under the laws of Oregon, under whom it is understood they claim.

The decision of this issue or question turns solely upon the proper construction of the Donation act. It matters not how probable or improbable is the claim of the plaintiffs or

how it may be decided. The determination of the question is the disposition of a case or suit arising under such act of congress. The jurisdiction is undoubted.

By section 4 of the Donation act there was granted to every white settler on the public lands then residing in Oregon, "who shall have resided upon and cultivated the same for four successive years" and otherwise complied with the provisions of such act, if a single man three hundred and twenty acres of land, and if a married man six hundred and forty acres—"one half to himself and the other half to his wife, to be held by her in her own right, and the surveyor general shall designate the part enuring to the husband, and that to the wife, and enter the same on the records of his office; and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased, shall be entitled to the share or interest of the deceased, in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon."

Section 5 of the same act granted "to all white male citizens of the United States" above the age of twenty-one years, "emigrating to and settling" in Oregon between December 1, 1850, and December 1, 1853, and to all such citizens "not hereinbefore provided for, becoming one and twenty years of age," in Oregon, and settling there between said dates, "who shall in other respects comply with the foregoing section and the provisions of this law," if a single man, one hundred and sixty acres of land, or if a married one, three hundred and twenty acres—"one half to the husband and the other half to the wife, in her own right; to be designated by the surveyor general as aforesaid." Section 5, as may be seen, is silent as to the disposition of the husband or wife's share in the donation, in case he or she should die intestate before the issue of a patent there-

for, and therefore the defendants contend that it descended to the heirs of the deceased, according to the local law.

But the plaintiff maintains that the clause in section 4 providing for the disposition of the share or interest of the deceased in such contingency ought to be applied to a like case occurring under section 5. As will be seen, this is not a mere question of interpretation of the words of the statute, but of the construction of it, and its solution involves the inquiry whether, taking into consideration the spirit and purpose of the whole act and the circumstances which led to its enactment, this clause in section 4, that by its language is limited to cases arising thereunder, was intended by the legislature to apply to similar cases arising under section 5.

The argument of the case has gone upon the theory that if, upon the death of Jane, her share in the donation did not descend under the local law, but went in the path prescribed by the Donation act for like cases arising under section 4 thereof, that then Wendell took the whole of it as survivor, while it appears upon the language of the act that he only took an equal portion with the heirs of Jane, be they near or remote, many or few. (*Cutting* v. *Cutting*, 6 Saw. 396.)

Counsel for the plaintiff relies largely upon the case of *Silver* v. *Ladd*, 7 Wall. 219, in which it was held that the grant in section 4 embraced an unmarried woman, as furnishing the key-note to the construction of the Donation act—that it is a most benevolent one and to be liberally construed.

But manifestly the court only intended this liberal rule of construction to extend to questions arising under the act between the government and persons claiming rights as settlers or donees thereunder, and not to questions arising between such settlers or donees, or those claiming under them; and even as thus understood, it was applied to settlers under section 4.

And so Mr. Justice Miller, after stating (*Silver* v. *Ladd*, *supra*, 225) that section 4 of the act "was passed for the purpose of rewarding in a liberal manner a meritorious

class who had taken possession of the country and held it for the United States under circumstances of great danger and discouragement," lays down the rule for the construction of the act, as between this "meritorious class" and the United States as follows: "Anything, therefore, which savors of narrowness or illiberality in defining the class, among those residing in the territory in those early days, and partaking of the hardships which the act was intended to reward, who shall be entitled to its benefits, is at variance with the manifest purpose of congress."

By the language of the provision in question its operation is confined to settlers under section 4. They are designated therein as "*such* married persons"—that is, the married persons spoken of in the preceding words of such section; and also as the "married persons" who have complied with the act "so as to entitle them to the grant as above provided"—that is, as provided in the foregoing part of section 4. In *Chambers* v. *Chambers*, 4 Or. 153, the supreme court of the state, held upon this ground that the provision was not applicable to the case of settlers under section 5, and that the share of the wife of a settler under said section, upon her death, after compliance with the act, descended to her heirs according to the local law of descents.

Nor does this provision manifest any absolute or controling purpose on the part of congress, even as to settlers under the fourth section, to establish a sort of joint tenancy in the donation between the husband and wife prior to the issue of the patent with the *jus accrescendi* or right of survivorship to the longest liver. For this survivorship, if it may be so called, was only to take effect in case the deceased did not dispose of his or her interest by will; and even then it was limited to an equal share in the donation with the children or heirs of the deceased, be the latter whom they may. (*Davenport* v. *Lamb*, 13 Wall. 428; *Cutting* v. *Cutting*, 6 Saw. 404.) And since the act of July 17, 1854 (10 Stat. 306), amendatory of the Donation act, either of "such married persons" might have disposed of his or her interest in the donation by a sale and conveyance thereof, so as to cut off any right of survivorship under this provision in section 4.

(*Barney* v. *Dolph*, 97 U. S. 652.) But on the other hand, the power to devise was unqualified, and under it the testator might dispose of his or her share of the donation to any one however remote from or unrelated to the survivor.

There is nothing then in this provision in section 4 giving the surviving husband or wife an equal portion in the deceased's share of the donation with his or her children or heirs, which calls for its application to donations under section 5. Nor, in my judgment, is there anything in the circumstances of the case, that requires the extension of this provision beyond the cases for which it purports to have been made, or that indicates it was or might have been the intention of congress to make it so.

At the passage of the Donation act there was no statute of descents in force in Oregon. Prior to September 12, 1849, when a person died in "the lawful possession of a land claim," it was considered a part of his personal estate, and disposed of by his executors or administrators accordingly. (Or. Laws, 1843–49, p. 61.) By an act of that date (Or. Laws, 1850–51, p. 246), it was provided that "land claims shall descend to and be inherited by the heirs at law of the claimant, in the same manner as is provided by law for the descent of real estate." But all that could have been meant or intended by this act was that such "heirs" should have the first right to the possession of the claim, for the territorial legislature was expressly prohibited by section 6 of the organic act (9 Stat. 323) from passing any act "interfering with the primary disposal of the soil." Nor was there any law regulating "the descent of real estate" in Oregon other than the common law, and how far that was applicable or in force was a matter as yet undetermined.

The territory had just been organized and but one session of the legislature had been held, (1849). The grant made by the fourth section of the act was confined to persons then in the territory or who should become resident thereof before the following December—a provision intended for the benefit of the immigrants of that year, then well across the plains. The greater portion of these contemplated beneficiaries had already complied with the preliminary

conditions of the act—residence and cultivation—and were entitled to the grant as soon as the law could be put in operation, so as to enable them to make their notifications and proof. Under this state of things this provision was probably put in section 4 to meet the contingency of the death of a married donee under it, occurring between compliance with the act and the issue of a patent and before the local legislature had established a law of descents for estates of inheritance in real property, then for the first time existing in the territory.

But as to section 5 the case was different. This grant was made to persons coming into the country after December 1, 1850, who should reside upon and cultivate the same for four successive years thereafter, and in the meantime the subject could be regulated by the territorial legislature whose power under section 6 of the organic act, *supra*, extended "to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." And in the case of persons dying before the completion of such residence and cultivation, and before the right to the grant vested in the settler and his wife, so as to give them an estate of inheritance therein, provision was made for the disposition of the possessory right of the settler by section 8 of the Donation act.

On December 14, 1853, (Or. Laws, 1853–4, 350), the territorial legislature passed an act concerning the descent of real property, in which it was provided that, "when any persons shall be seised of any lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein in fee-simple or for the life of another, not having lawfully devised the same they shall descend, subject to his debts," as therein prescribed. This law has been substantially in force ever since, except the period between June 1, 1863, and October 24, 1864; and under it, upon the death of Jane Proebstel in June, 1867, her share of the donation in which she then had an inheritable estate descended to her heirs—to her lineal descendants first, and in default of these, to her collateral heirs.

These two sections—the fourth and fifth—although parts

of one act, and containing some provisions in common, are in essentials different and independent grants. They are made upon different motives and considerations, for different quantities of land, and to a different class of persons. The first had its motive in the past, and the second in the future. The one was made as a reward for immigration and settlement substantially accomplished, and the other was offered as an inducement for future immigration and settlement. (*Silver* v. *Ladd, supra,* 227; *Chambers* v. *Chambers, supra,* 155.)

In *Barney* v. *Dolph, supra,* 654, Mr. Chief Justice Waite, who has done so much toward a lucid and comprehensive exposition of this Donation act, says: "Section 4 was evidently intended for the benefit of this class"—that is, the early settlers who at the passage of the act were occupying the country under the land law of the provisional government; and that the provision in that section concerning the disposition of the donation to married persons in case of the death of one of them, after compliance with the act and before the issue of a patent is, from "the language used, evidently" confined "in its effect to the married persons mentioned" therein.

The demurrer is sustained.

WELLS, FARGO & CO. *v.* OREGON RAILWAY AND NAVIGATION CO. SAME *v.* OREGON AND CALIFORNIA RAILWAY CO.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 19, 1883.

1. EXCEPTIONS FOR IMPERTINENCE.—Exceptions to a bill for impertinence will not be allowed, unless it is clear that the matter excepted to cannot be material to the plaintiff's case; and matters which may be so material are not necessarily impertinent, because they are such as the court may judicially take notice of; nor is it necessarily impertinent in a bill for an injunction to refer to recent adjudications of the question involved, in similar cases in other courts.

1883.] Points decided.

2. ACT OF INCORPORATION—CHANGE OF CORPORATE NAME.—By an act of the legislature of Colorado, of February 5, 1866, certain persons were incorporated as the "Holladay Overland Mail and Express Company," with the privilege and power of changing its name by an "order" of its directors, "approved" by the stockholders; the bill alleges that the stockholders, in pursuance of said act, duly changed the name of the corporation to "Wells, Fargo & Co.," which change was afterwards approved by the legislature by the act of January 26, 1872. *Held*, 1. That until the contrary appears, it should be presumed that the final action of the stockholders was had in pursuance of the order of the directors; 2. That the essential act in the proceeding was the vote of the stockholders, to which the order of the board was only preliminary, and, therefore, that portion of the act providing for such order ought to be considered merely directory; and, 3. *Semble*, That the act of 1872, approving the change, is not in conflict with section 1889 of the revised statutes, forbidding the legislature of Colorado from granting "private charters or especial privileges."
3. EXPRESS FACILITIES.—This term is probably a sufficient description of the accommodation or service which a railway or other transportation company is expected, and may be required to furnish, a person or corporation engaged in the express business.
4. EXPRESS BUSINESS.—This business has come to be a recognized branch of the carrying trade, of which the court will take notice; and a railway or other corporation created by the state to serve the public as a common carrier, is bound to furnish the usual and proper facilities to persons engaged in such business, who are so far the agents, bailees, and representatives of the public.
5. DECISIONS OF THE UNITED STATES CIRCUIT COURTS.—The circuit courts of the United States are co-ordinate tribunals, constituting a single system, and the decision of one of them, deliberately made, ought usually to be regarded as decisive of the question involved, until otherwise determined by the supreme court.
6. COMPENSATION OF A RAILWAY CORPORATION.—Section 36 of the incorporation act (Or. Laws, 532), which declares a railway corporation formed thereunder to be a common carrier, and empowers it "to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe," authorizes such corporation to take reasonable tolls, not inconsistent with its character and obligation as a common carrier, and no more; and, so far, it constitutes a contract between the corporation and the state, the obligation of which the latter cannot impair, nor any court disregard.
7. REASONABLE COMPENSATION.—What is reasonable compensation under said section 36, when the parties cannot agree thereabout, is a question to be determined by the court; but in allowing a provisional injunction, requiring a railway corporation to furnish an express company with the facilities theretofore enjoyed by it, over and upon its road, the court will assume that the compensation paid for such past facilities is reasonable, and require them to be furnished under the injunction at the same rates.

Before DEADY, District Judge.

MOTIONS for provisional injunctions.

Clarence A. Seward, M. W. Fechheimer and J. R. Lewis, for plaintiff.

Joseph N. Dolph and James F. McNaught, for defendants.

DEADY, J. These suits were commenced on December 11, 1882, and on the same day an order was made in each requiring the defendant therein to show cause why a provisional injunction should not issue, as prayed for in the bill; and, also, that in the meantime the defendants be so restrained. On January 25th and 26th the motions for provisional injunctions were heard at length—all the questions which can or may arise in the cases being argued by counsel with much zeal and ability. Contemporaneous with these, a similar suit was commenced by the plaintiff in Washington territory against the Northern Pacific Railway Company, and by an understanding between court and counsel a motion for an injunction was heard in that case at the same time with the Oregon cases—Mr. Chief Justice Greene, of that territory, in whose court the case is pending, being present at the hearing.

It appears from the bill in each case that the plaintiff is a corporation organized under the laws of Colorado and engaged in the express business on the Pacific coast and elsewhere to the eastward of the Rocky mountains, including the country traversed by the lines of the defendants' railways, steamboats, and steamships in Oregon, Washington, Idaho, California, and British Columbia; and has been such corporation and so engaged since February 5, 1866, when it succeeded to the express business carried on by Henry Wells, William G. Fargo, and four others, between New York and San Francisco and elsewhere on the Pacific coast, since March, 1852. The defendants, the Oregon Railway and Navigation Company, and the Oregon and California Railway Company, are corporations formed under the laws of Oregon, with their principal places of business in Port-

land, and engaged in the business of a common carrier of freight and passengers, and as such corporation, the former owns and operates certain lines of railways, steamboats, and steamships in Oregon, Washington, California, and British Columbia, and the latter owns and operates certain lines of railway in Oregon.

It is alleged in the bills that heretofore the plaintiff has been furnished by the defendants with all the necessary facilities for doing its express business over and upon their said lines of transportation, for which it has paid them a stipulated price, but that now the defendants refuse to furnish such facilities any longer, and have notified the plaintiff that hereafter they intend to do the express business on their lines of transportation themselves; and that such refusal would work an irremediable injury to the plaintiff.

The defendants filed exceptions to the bills for impertinence, which were heard and submitted at the same time with the motions for the injunctions. They are numerous and include a large portion of the allegations contained in each bill, such as: 1. Matters which the court can judicially know; 2. The extent, value, and importance of the express business in the United States and the circumstances under which it has grown up and is transacted; 3. The usage and past conduct of railway companies in relation to the same; 4. The citation and quotation of acts of congress concerning or recognizing the express business; and, 5. The averments concerning prior injunctions allowed by the courts in similar cases.

An allegation will not be expunged from a bill as impertinent unless its impertinence clearly appears, for if it is erroneously struck out the error is irremediable. (Story's Eq. Pl., sec. 267.) Consistent with this rule I do not think these exceptions ought to be allowed. It may be material to a full and proper presentation of the plaintiff's case to allege the existence of facts within the judicial knowledge of the court, and if so, they are pertinent thereto. The fact that they may be proved by reference to the judicial knowledge does not dispense with the averment of them or at least render such averment impertinent.

So, in regard to the allegations concerning the business in which the plaintiff is engaged and is seeking by this means to protect—the facts concerning its origin, growth, value, importance, and relation to the public and transportation companies, such as the defendants, may all be material to a proper understanding of the plaintiffs' case; and if so, that may be stated with reasonable fullness in the bill. And this rule is more especially applicable to cases like these, which, although not exactly of first impression, involve the application of established rules and principles to new and important instances arising out of comparatively recent but radical changes in the methods and circumstances attending the receipt, transportation, and delivery of a very large amount of the valuable personal property in transit over the country.

Concerning the injunctions alleged to have been recently allowed in several of the United States circuit courts in similar cases, the matter is undoubtedly a proper one for the consideration of the court, as the adjudication of co-ordinate tribunals, and my impression is that it may as well be brought to the attention of the defendants and the knowledge of the court in this way, as similar adjudications, to which the plaintiff is a party, commonly are, in suits for infringement of patents. (Curt. Eq. Prec. 30; Curt. L. of Pat. 544.)

In answer to the applications for the injunctions the defendants filed the affidavits of their respective managers; but neither of these contradict or qualify the facts now here stated except in one particular. The affidavit of the manager of the Oregon and California Railway Company denies that the plaintiff has been notified that it would no longer be allowed express facilities on its lines of railway, but on the contrary avers that the plaintiff has a contract with said defendant for said facilities until November, 1, 1883, as far south as Roseburg, but not over the extension being constructed to the southern boundary of the state, and, then completed to Riddle's station, some twenty-six miles south of Roseburg.

But it appears from the affidavit of the president of the

plaintiff that he was informed by the president of the Northern Pacific Railway Company, and both the defendant corporations in November, 1882, that the notice to the plaintiff from the Oregon Railway and Navigation Company to the effect that it would not be allowed express facilities on its lines of transportation after December 31, 1882, except upon the steamships running between Portland and San Francisco, would lead to the same result, in the case of the Oregon and California Railway Company, and that his board had determined to conduct the express business on the lines of the Northern Pacific Railway Company, and those of the defendants for themselves. Under the facts, then, I think it may be concluded that the defendants intend and will, unless restrained therefrom, withdraw from the plaintiff on their lines of transportation, all the express facilities heretofore afforded it; for the small portions of such lines which may not be included in that purpose at present would be of no benefit to the plaintiff if excluded from the remainder.

But upon the case made by the bills, counsel for the defendants object to the allowance of the injunction, because: 1. It does not appear that the plaintiff is a corporation or has capacity to sue; 2. The statement as to the facilities heretofore afforded the plaintiff, and which will hereafter be required for the transaction of its business, is insufficient; 3. The defendants cannot be required, under their articles of incorporation and the laws of the state, to afford the plaintiff the facilities demanded, or to give it a preference over other shippers in the transportation of freight; 4. If the plaintiff is entitled to a continuance of the facilities heretofore afforded it over existing lines, it is not so entitled as to future extensions of such lines; and, 5. The court has no power to determine the compensation to be paid by the plaintiff to the defendants for express facilities.

It is admitted that the plaintiff was, on February 5, 1866, duly incorporated by an act of the legislature of Colorado of that date as "The Holladay Overland Mail and Express Company," but it is claimed that the subsequent attempt—

November 12, 1866—to change its name to "Wells, Fargo & Company, failed of its purpose, and therefore there is no corporation of the latter name. It appears that section 11 of the act incorporating the Holladay Overland Mail and Express Company, contained a provision that "said company may change its name whenever the same shall be ordered by the vote of a majority of the board of directors thereof, at a meeting duly convened for that purpose; *provided*, such change is approved also by a majority of the stockholders in interest at a meeting duly convened for that purpose by a call from the president of the company."

The bills allege that "on November 12, 1866, and pursuant to the power conferred by section 11 of said act of incorporation, the stockholders of the said 'Holladay Overland Mail and Express Company,' duly changed its said corporate name to the name of 'Wells, Fargo & Company;' and such change was duly approved by an act of the legislature of Colorado, passed January 26, 1872." The argument for the defendant upon this point is, that a stockholder's meeting could not change the name of the corporation, because the act provided that the change should take place by the act of the directors, with the approval of the stockholders. In support of this construction of the act, counsel cites *Wallamet Falls Company* v. *Kittridge*, 5 Saw. 48, in which case, this court held that under section 19 of the Oregon Corporation act (Or. Laws, 528), which provides that a meeting of the stockholders of a corporation may "*authorize* the dissolution" thereof, that such vote did not dissolve the corporation, but only empowered the directors, by whom all the powers of the corporation were exercised, unless otherwise specially provided (Or. Laws, 526, sec. 9), to take the necessary steps for its dissolution and the winding up of its affairs. But the cases, so far from being parallel, are just the reverse. The Colorado act gave the preliminary action in the matter to the directors and the final effective action to the stockholders, while the Oregon act gives the initiative to the stockholders and the actual determination of the question to the directors.

My impression is, that upon the facts stated, the name of

the corporation was duly changed. And first, it is alleged to have been done by the stockholders "pursuant to the power conferred" on them by the act authorizing the change, that is, according to it, and to have been "duly" done by them, that is, according to law. Upon these allegations, and until the contrary appears, I think it ought to be presumed that the action of the stockholders was taken after the preliminary order of the directors, rather than without it. And second, taking into consideration the whole provision on the subject of changing the name and the reason of it, the act ought to be construed as practically giving the power to make the change to the stockholders absolutely, with or without the preliminary order of the directors. The latter are not authorized to change the name, but merely to make an order that it may be done by the "company," and then comes the proviso and gives the final power over the subject to the "stockholders." The directors are the mere agents of the stockholders, and the clause giving them authority to order the change becomes a mere regulation of convenience concerning the method and order in which the thing is to be done, and not the essence of it. It is, therefore, merely directory. (*Sprigg* v. *Stump*, 7 Saw. 286, and cases there cited.)

In *Rex* v. *Loxdale*, 1 Burr. 477, Lord Mansfield said: "There is a known distinction between the circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory." It is not necessary, therefore, to consider what was the effect of the act of January 26, 1872, purporting to legalize the alleged change of name. For the defendants, it is contended that the act is invalid as being in conflict with section 1 of the act of March 2, 1867 (14 Stat. 426, sec. 1889, R. S.), forbidding the legislature of a territory "to grant private charters or special privileges," but permitting it to provide for the formation of corporations by "general corporation acts."

This argument assumes that a legislative act naming or changing the name of a corporation is so far an act authorizing the formation of a corporation—a calling it into exist-

ence or conferring upon it a special privilege, and *Newby* v. *The Or. Cen. Ry. Co.*, 1 Deady, 616, is cited as showing that "the corporate name is a necessary element of the corporation's existence," without which "a corporation cannot exist." But this remark must be considered as made with reference to a corporation formed under the Corporation act of Oregon, section 4 of which (Or. Laws, 525) expressly provides, that the articles of incorporation "shall specify the name assumed by the corporation, and by which it shall be known." And yet the law might provide that A. B., and C. should constitute or be formed into a corporation for any lawful purpose without any special name or designation. From the necessity of the case, it would have to be described, rather than named, as A., B., and C., a corporation duly created or formed at a certain date for a certain purpose, and in time it might acquire the name of "the A., B., and C." railway or steamboat company, as the case might be.

I doubt, then, if section 1889 of the Revised Statutes does prohibit a territorial legislature from naming or changing the name of an existing corporation, because such act is not a "charter" creating a corporation or one conferring a "special privilege" within the meaning of the section. To name a corporation is not to create it any more than to name a person is to create it. Nor does it confer on it a special privilege. The privilege of having a name is not thereby monopolized or exhausted, but may be enjoyed by every corporation that has wit enough to devise one, upon the same terms. (See *Southern Pacific Ry. Co.* v. *Orton*, 6 Saw. 185.) But the attempt to legalize the change of name may be said to be an admission of its invalidity. Yet it must be considered that the matter of the change is lumped in the legalizing act with changes in the capital stock and other "acts and proceedings of the corporation," and therefore the validation of the change of name may have had very little to do with the passage of the act. And this suggestion gets force from the recital in the preamble to the act, to the effect that the name had been changed to Wells,

Fargo & Company by "the board of directors and stockholders."

As to the insufficiency of the statement of the facilities allowed the plaintiff on the defendant's lines, and which will hereafter be required thereon for the transaction of its business, my impression is that the bills are probably explicit enough, though I think they might well have been made more so. But "express facilities" is a term, which, from the nature of things, must by this time be pretty well understood between the parties most interested—the express company and the railway company.

As interpreted by the customs and usages of these parties and sanctioned and adopted by the decisions of the courts, these facilities may be said to include the right to enter depots and stations with loaded and empty wagons, the use of the platforms and space for the loading and unloading of express freight, sufficient space in suitable cars drawn in passenger or quick trains for the transportation of such freight and a messenger in charge thereof, with room for its assortment while in transit and a sufficient delay at stations for the delivery and receipt of express matter. (*Southern Express Co.* v. *Iron etc. Ry. Co.*, 10 Fed. Rep. 213, 869; *Southern Express Co.* v. *Memphis etc. Ry. Co.*, 8 Id. 802.) "Express facilities," from the nature of the business, cannot be limited to a definite space, but must correspond in this and other particulars to the public want and convenience to which the express company ministers. In these cases there can be no difficulty for the present in ascertaining the facilities required by the plaintiff. For the purposes of this application they are such as it has heretofore been allowed. Under the restraining orders allowed on the filing of the bills, the defendants are now furnishing and the plaintiff is receiving just such facilities without any inconvenience to either party.

But the third objection, that the defendants cannot be required under their charter and the laws of the state to afford the plaintiff the facilities demanded, or to give it a preference over shippers in the transportation of freight, is the one principally relied on by the defendants to de-

feat these applications for injunctions. Upon this point, the arguments and brief of counsel for defendants have left nothing unsaid in their behalf.

Briefly, the argument is this: At common law, while a common carrier must carry for all at a reasonable compensation, which must be settled by the courts if not agreed on by the parties, still, he may discriminate in his charges, by carrying in some instances for less than a reasonable compensation if he chooses. There is no statute in Oregon changing this rule of the common law, or requiring a corporation to transport freight in a passenger train and in the custody or under the control of the shipper, therefore the defendants cannot be required to carry freight for the plaintiff at the same rate they may for others, or to furnish it any such facilities. In short, it is denied, that either under the laws of Oregon or the past dealings between the parties "it is the duty of the defendants to permit an express business to be done over their lines of transportation at all, in the manner required by the plaintiff," and therefore they may refuse to do so if they please. In passing upon this question at this preliminary stage of these cases, I do not deem it necessary to do more than to state my impression of the law as applicable thereto.

In the cases of the *Southern Express Co.* v. *St. Louis etc. Ry. Co.*; *Same* v. *Memphis etc. Ry. Co.*; *Dinsmore* v. *Missouri etc. Ry. Co.*; *Same* v. *Atchinson etc. Ry. Co.*; *Same* v. *Denver etc. Ry. Co.*, 10 Fed. Rep. 210, arising in Missouri, Arkansas, Kansas, and Colorado, and lately heard together at St. Louis before Mr. Justice Miller, of the supreme court, and Circuit Judge McCrary, the defendants were perpetually enjoined from refusing or withholding the usual express facilities from the plaintiffs. In the opinion delivered by Mr. Justice Miller it is stated "that the express business is a branch of the carrying trade that has by the necessities of commerce and the usages of those engaged in transportation become known and recognized," and sufficiently so "to require the court to take notice of it, as distinct from the transportation of the large mass of freight usually carried on on steamboats and railroads;" and "that the object of

this express business is to carry small and valuable packages rapidly in such manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like." And also that "It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it," without any right on the part of the railway company "to open and inspect" them; that it is "the duty of every railroad company to provide such conveyance by special cars or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually engaged in the express business at fair and reasonable rates of compensation," to be determined by the court where the parties cannot agree thereon; and that a court of equity "has authority to compel the railroad companies to carry this express matter and to perform the duties in that respect," as indicated.

Substantially the same conclusion had been reached by several other judges in the United States circuit courts in the same and similar cases reported in 2 Fed. Rep. 465; 3 Id. 593; Id. 775; 4 Id. 481; 6 Id. 426; 8 Id. 799. The only case cited from the decisions of the national courts to the contrary of these, is *Chamblos* v. *Pennsylvania etc. Ry. Co.*, 4 Brewster, 563, in which a preliminary injunction was refused by Judge McKennan in a similar case; and also the cases, in the state courts, of *New England Express Co.* v. *Maine etc. Ry. Co.*, 57 Maine, 194, and *Seargent* v. *Boston etc. Ry. Co.*, 115 Mass. 416, in which the right of an express company to what are known as express facilities on the defendants' roads was denied.

But the very decided weight and number of the authorities recognize the existence of the express business and the right of those engaged in it to have the proper facilities therefor allowed them by the defendants, and to secure the

same by injunction in case they are refused. Until this question is settled by the supreme court, these deliberate decisions of co-ordinate tribunals, like the circuit courts, ought, except in an extreme case, to furnish a guide for the decision of this court.

This is the rule that has been followed by the justices of the supreme court on the circuit. (*Washburn* v. *Gould*, 3 Story, 133; *Brooks* v. *Becknell*, 3 McLean, 250; *American etc. Co.* v. *Fiber etc. Co.*, 3 Fisher, 363.) And in *Goodyear etc. Co.* v. *George Milles et al.* (7 Pat. Off. Gaz. 40), Judge Emmons examines the question at some length and concludes, that—"If one system of co-ordinate courts more than another calls for the application of these general principles, it is that of the circuit courts of the United States. * * * Although divided in jurisdiction, geographically, they constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demands that it should be followed, until modified by the appellate court."

However, my own impressions of the law are in harmony with these rulings.

If the defendants were merely private common carriers, and the manifest fact being admitted that within the last thirty or forty years persons or organizations known as expressmen, or express companies, have grown up in the country and introduced and are conducting the business of transporting a class of comparatively small but valuable packages over railway lines in special cars attached to passenger trains in the charge of an agent—the same being collected and delivered by said companies at points beyond the line or termini of the railway—it would be their duty to furnish the usual facilities for such transportation over their lines. The obligation of a common carrier, as that of others who serve the public, may vary with the condition and circumstances of society. What is suitable and convenient in one age, is not in another. The individuals who constitute the public have found it convenient to employ the express companies to transport certain articles for them instead of attending to it in person. So far, then, these

companies represent the public, and as it has become an established usage and common method in the carrying trade to transport such packages in the charge of the shipper in a special car on passenger time, they have the same right to demand and receive these facilities at the hands of the defendants, as would any one of the individuals whom they they represent.

But the defendants are common carriers and more. They are also corporations created by the state for the public use, and may be compelled to perform their corporate functions accordingly. True, the stock of the defendants is private property, and their business is directly managed by private persons of their own selection. But, nevertheless, the prime purpose of their creation and existence is to furnish the public suitable and convenient facilities for transportation of freight and passengers. It is the business of the state to establish and maintain highways, as means of transportation and communication within its borders, and to this end, it created these defendants; authorized them to condemn private property to their use, to construct and operate their roads and to take tolls for carrying freight and passengers thereon. (*Talcott* v. *The Township of Pine Grove*, 1 Flipper, 144; *The People* v. *The N. Y. Cent. R. Co.*, N. Y. Supreme Court; *The Daily Register*, Feb. 10, 1883; *Railway Co.* v. *Maryland*, 21 Wall. 470.)

The defendants having been created by the authority of the state to serve the public as common carriers, cannot lawfully omit or refuse to perform their duty in this respect. They exist to do the business of a common carrier, and to do it in that way and manner which the law directs, or the well established usage of the country requires. For this service they are entitled to a reasonable compensation. But it can make no difference to them, whether such compensation is paid directly by the owner of the package transported or by the plaintiff as his bailee and agent.

Neither is the business of the plaintiff in any sense or degree a burden or tax upon the corporate faculties or resources of the defendants. On the contrary, it is, from the very nature of things, of benefit to them. For, by reason

of the special means it uses to collect, care for in transit, and deliver the freight confided to its custody on and beyond the line of the railway, it must contribute materially to the volume and value of the business done thereon.

In considering this phase of the question, I have laid out of view the allegation that the plaintiff has expended time and money in building up its express business on and over the defendants' lines of transportation, which it would be unjust and inequitable now to deny it the further use and benefit of; and I rest my conclusions on the fact, as stated by Mr. Justice Miller, that the express business has become a recognized branch of the carrying trade, and therefore the defendants, being corporations required and authorized by the state to serve the public as, and transact the business of, common carriers, are bound to furnish the plaintiff, as the agent, bailee and representative of the public, so far, with the proper and usual facilities for doing this branch of such trade.

This makes it unnecessary to consider the fourth objection of the defendants, that the plaintiff is not, by reason of the facilities heretofore afforded it on existing lines of transportation, entitled to the relief sought as to any future extensions thereof.

And this brings me to the consideration of the fifth and last objection, that the court has no power to determine the compensation to be paid by the plaintiff to the defendants for the service demanded. Counsel for the defendants rest this objection on the ground that the state, in and by section 36 of the corporation act, has contracted with the defendants that they may charge such tolls as they may see proper, and that therefore they cannot be required to carry freight for the plaintiff on any other terms or conditions.

Section 2 of Article XI. of the state constitution is also cited. It provides that corporations, except municipal ones, shall not be created by special laws; and "All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights." Section 36 of the corporation act (Or. Laws, 532) provides:—"Every corporation formed under

this chapter for the construction of a railway, as to such road, shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for the transportation of persons or property thereon as it may prescribe."

It is not apparent that this constitutional provision has any bearing on the question under consideration. The legislature has not undertaken to repeal or modify section 36 of the corporation act, and this court is bound in the meantime to allow it full force and effect. If it constitutes a contract between the state and the defendants, by which they are absolutely and perpetually authorized to fix their own charges for transportation, as claimed by their counsel, it is protected from hostile legislation by section 10 of Article I. of the federal constitution.

But if it is not a contract at all, but a mere permission for the time being, then it is not a vested right, but a matter subject to the power of the legislature. However this may be, it is in the meantime a law of the state applicable to the subject of the right of the defendants to take tolls, which this court must construe and give effect to accordingly.

And first—the right to take tolls on a highway is an attribute of sovereignty and cannot be exercised by the defendants without the authority of the state. It may be said that the authority to form a corporation to construct and operate a highway, as a common carrier, impliedly gives the right to take reasonable tolls for traffic thereon. But this has not always been conceded. In the *Proprietors of the Stourbridge Canal* v. *Wheeley et al.*, 2 Barn. & Adolph. 792, the plaintiffs were the proprietors of a canal which they had constructed under an act of parliament, giving them authority to exact toll for all articles which passed "through any one or more of the locks." The right of all persons to navigate the canal was also secured by the act, and the defendants had used the canal in transporting quantities of coal but only over one of the levels and not through any of the locks. The court of king's bench held that the act did not authorize the taking of tolls except for going through the

locks, and therefore the plaintiffs could not exact them for the navigation of the canal between the locks merely.

It is altogether probable that the clause concerning tolls was inserted in this section primarily to authorize the taking of tolls at all, and then, for the time being, at least, only in such amount as the corporation might *prescribe*—that is, fix and set down beforehand, and not according to the whim or caprice of each occasion. Again, the legislature, in enacting this section, is presumed to have acted with knowledge of and reference to the fact, that by the common law a common carrier was only entitled to a reasonable compensation for his services.

The reasonable inference from the circumstances, is that the legislature in consideration of the premises, intended to confer upon the corporation, so long as it maintained and operated its road as a highway, as a common carrier, at least the authority to take reasonable tolls. In other words, the duty and obligation of a common carrier being imposed on the defendants, they were granted the corresponding privilege of charging a reasonable compensation for their services. And so far, I think this section is a contract between the state and the defendants, the obligation of which it is beyond the power of the latter anywise to impair (sec. 10, Art. I., U. S: Const.), or any court to disregard. But in my judgment, the section was not intended to do more than this, and ought not to be otherwise construed. It is a license or grant to the defendants upon sufficient consideration to take such tolls for freight and passengers as are consistent with the duty and obligation they owe to the public as common carriers.

It is well settled that a grant of this kind is never to have effect beyond its plain terms, or contrary to the manifest reason of it. And if there is a reasonable doubt as to its scope or meaning, that doubt must be resolved in favor of the public or state. (*Charles River Bridge* v. *Warren Bridge*, 11 Pet. 544, 600; Cooley's Con. Lim. 394, and the cases there cited.) And this question seems in effect to have been similarly disposed of by Mr. Justice Miller in the case of the *Southern Express Co.* v. *St. Louis etc. Ry. Co.*,

10 Fed. Rep., *supra*. For, in the answer of the defendant, as appears from a quotation therefrom in the brief of counsel for the plaintiff, it is stated that under its charter it was authorized to transport all articles usually carried on railways, and "to charge and receive such tolls and freights" therefor "as shall be to the interest of the same, and that the directors of the defendant are therein authorized to establish such tolls, and to alter the same from time to time;" and in the opinion allowing the final injunction he says (10 Fed. Rep. 215): "I am of the opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies." Under the circumstances, this language can only be understood as a decision that the grant to the Missouri corporation to take tolls, in similar if not stronger language than the Oregon one, is to be taken and considered as a grant to take only reasonable tolls.

The question of the power or right of the defendants to engage in the express business at all, at least the accessorial service of collecting and distributing packages off their lines of transportation, has been argued also, but it is not necessary now to consider it. The plaintiff does not ask to exclude the defendants from the business, but only that it may be permitted to carry it on as heretofore.

On the whole, I am of the opinion that the plaintiff is entitled to the relief sought and therefore ought to be secured by injunction until the final hearing, in the use of the facilities for conducting its business heretofore allowed it by the defendants. A special reason for allowing the provisional injunction is also found in the fact, that by exacting the proper security from the plaintiff, the defendants will not be injured, even if it should be finally determined that the plaintiff is not entitled to relief; while if the injunction is not now allowed, its business will be like water spilled on the ground—irrecoverably destroyed. (Kerr Injunctions, 212.)

The defendants being secured by the operation of section

36 of the corporation act, as now construed, in the right to take reasonable tolls, the question of what is reasonable, must, unless the parties can agree about it, be determined by the court. But for the purpose of the provisional injunction the court will, for the time being, assume that the compensation heretofore paid by the plaintiff to the defendant for express facilities is reasonable, and will require the defendants to furnish them to the plaintiff during the pendency of the suit, or until the further order of the court, upon their lines of transportation and the extensions of them, at the same rates.

Let an injunction issue commanding and restraining the the defendant in each case, as prayed for in the bill, the plaintiff first giving bond with sufficient sureties to be approved by the master of this court in the sum of twenty thousand dollars, conditioned to pay the defendant a reasonable compensation from time to time for such facilities, as heretofore, and all damages which the defendant may sustain by reason of this injunction, if the same shall be adjudged wrongful, to be ascertained by a reference or otherwise, as this court may direct. (*Russell* v. *Farley*, 105 U. S., 443.)

A. H. SPARE *v.* HOME MUTUAL INSURANCE CO.

CIRCUIT COURT, DISTRICT OF OREGON.
MARCH 28, 1883.

1. FIRE INSURANCE—CONTRACT FOR.—A contract for insurance against loss by fire is a contract of indemnity; and a contract to that end with a person who has no insurable interest in the property or cannot sustain any pecuniary loss by injury thereto is a mere wager, contrary to public policy and void.
2. INSURABLE INTEREST.—Any person who has a legal or equitable interest in property, or is so related to it that an injury to it may cause him pecuniary loss, has an insurable interest therein.
3. JUDGMENT CREDITOR.—A judgment creditor has an insurable interest in the property of his debtor; but he cannot recover from the insurer upon an injury thereto as for a loss to himself, unless he also shows that the judgment debtor has not sufficient property left out of which the judgment can be satisfied.

4. VOID CONTRACT—ESTOPPEL.—While the insurer may be estopped to insist on conditions and restrictions contained in a policy issued with a knowledge of facts inconsistent therewith, neither party to a contract of insurance which is void, as being contrary to public policy, is estopped to deny its legality.

Before DEADY, District Judge.

W. Scott Bebee, for the plaintiff.

Cyrus Dolph, for the defendant.

DEADY, J. The plaintiff, a citizen of Oregon, brings this action against the defendant, a corporation formed under the laws of California and doing business in Oregon, to recover the sum of nine hundred dollars, with interest since March 1, 1882, on a policy of insurance for that amount, against loss by fire. The case was heard upon a demurrer to the complaint. The question argued was, had the plaintiff an insurable interest in the property destroyed?

From the amended complaint it appears that on July 26, 1881, Aaron and Ben Lurch were partners under the name of "Lurch Brothers," and as such, owned a lot in Cottage Grove, Lane county, Oregon, of the value of one hundred dollars, together with a warehouse thereon of the value of one thousand three hundred dollars; that on December 1, 1878, the plaintiff obtained a judgment against said firm, in the circuit court of the state, for said county, for the sum of four thousand five hundred dollars, which judgment was duly docketed before said July 26, and thereafter was a lien upon all their property in said county; that on said last-mentioned date the defendant, in consideration of the premium of eighteen dollars and ninety cents, paid to it by the plaintiff, insured him against loss or damage by fire, to said warehouse, for one year, in the sum of nine hundred dollars, and that on February 14, 1882, said warehouse was totally destroyed by fire, whereby the plaintiff was damaged one thousand three hundred dollars.

The complaint also states that on March 1, 1882, the proof of loss was furnished and the same adjusted at nine hundred dollars, and that the defendant at all the times

mentioned well knew that the property was owned by "Lurch Brothers," and the nature of the plaintiff's interest therein. A contract for insurance against fire with a person not having an insurable interest in the property, or subject of the insurance, is a mere wager, and considered void on grounds of public policy. For where the only interest that the assured has in the property is its destruction by fire, the transaction is regarded as a direct incentive to fraud and arson.

A lawful contract of insurance against fire is, therefore, a contract of indemnity—an engagement to make good to the assured a pecuniary loss sustained by him, on account of injury to the property in question. Therefore it is said that the assured must have an interest in the property injured, for otherwise he can suffer no loss thereby. (Woods F. Ins., sec. 248; *Rohrbach* v. *Germania F. Ins Co.*, 62 N. Y. 52; *Grevemeyer* v. *The S. F. Ins. Co.*, 62 Pa. St. 340; *McDonald* v. *Adm'r of Black*, 20 Ohio, 191; *Carter* v. *The Humboldt F. Ins. Co.*, 12 Iowa, 287; *Godin et al.* v. *London Assurance Co.*, 1 Burr. 489; *Hancox* v. *Fishing Ins. Co.*, 3 Sumn. 134.)

But what is such an interest in the property is not altogether clear upon the authorities. In *Hancox* v. *Fishing Ins. Co.*, *supra*, 140, Mr. Justice Story says "that an insurable interest is *sui generis*, and peculiar in its texture and operation;" and that "it sometimes exists where there is not any present property or *jus in re*, or *jus ad rem*." In *Rohrbach* v. *Germania F. Ins. Co.*, *supra*, 54, Folger, J., said, this interest need not amount to a legal or equitable title to the property, but that "if there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest."

Accordingly, it has been held that a person having a specific lien upon property as a security for a debt, such as a mechanic or mortgagee, has an insurable interest therein,

and that although he may also have the personal obligation of his debtor for the payment of the same. (*Carter* v. *The Humboldt F. Ins. Co., supra.*) And in *Herkimer* v. *Rice*, 27 N. Y. 163, it was held that the creditors of an insolvent estate had an insurable interest therein, upon the ground that the same was pledged by the law to the payment of the debts of the deceased. (See also comments on Chief Justice Denio's opinion in this case, by Folger, J., in *Rohrbach* v. *Germania F. Ins. Co., supra*, 57.)

But no case has been found in which it was held that a judgment creditor by reason simply of his lien on the judgment debtor's property has an insurable interest therein. While in *Grevemeyer* v. *The S. M. F. Ins. Co., supra*, it was distinctly held that he had not. The decision is placed on the ground that "a judgment is a general and not a specific lien. If there be personal property of the debtor, it is to be satisfied out of that. If there be not, then it is a lien on all his real estate without discrimination, and hence the plaintiff is not interested in the property as property, but only in the lien." It does not appear from the report of the case whether the debtor had other property out of which the judgment might have been satisfied or not.

In considering this question it ought not to be overlooked that insurance against loss, to the party insured, by fire, is a transaction intended and calculated to preserve and promote the financial security and stability of the community, and therefore ought to be regarded with favor and upheld by the courts. On the other hand, a wagering policy by which the assured is to receive the insurance upon the destruction of the property, although he lost nothing thereby, the courts will not enforce. But, in my judgment, whoever is in danger of loss by fire ought to be allowed to insure against it. Whenever it appears that the assured has a pecuniary interest in the preservation of the subject-matter of the insurance against injury by fire, he has such an interest therein or holds such a relation thereto, as gives him a right to protect himself by insurance.

A judgment creditor, in Oregon, upon the docketing of his judgment, has a lien upon all the real property of the

judgment debtor within the county, as a security for his debt. (Or. Code, C. P., sec. 266.) But such a lien cannot be enforced, if sufficient personal property can be found to satisfy the judgment. (Id., sec. 273.) Under these circumstances if it appears that the debtor has no personal property and that his real property, with the combustible improvements thereon, is not more than sufficient to satisfy the judgment, I think the creditor ought to be regarded as having an insurable interest. Although he has no legal or equitable title to, or interest in the property, he certainly sustains such a relation thereto that any injury to it would cause a corresponding loss to him; and nothing more than this can be said of the right of a mortgagee, mechanic, or even the legal owner to insure. In the corpus of the property insured he may have no interest or estate, but he has a pecuniary interest in its preservation and may sustain a loss by its destruction. (*Springfield F. & M. Ins. Co.* v. *Allen*, 43 N. Y. 389.)

But when the judgment debtor has personal property out of which the judgment can be made or when the real property upon which it is a lien is clearly more than sufficient for that purpose, is the judgment creditor thereby precluded from protecting himself by insurance against possible loss from injury to his security by fire? This is a question upon which no direct decision has been found, except the one in *Grevemeyer* v. *S. F. Ins., Co. supra*. But upon general principles I think such creditor has an insurable interest; that is, he sustains such a relation to the subject as gives him an interest in its preservation against fire. The law gives the judgment creditor a lien on his debtors' real property as a security for his debt, and whatever may be its value as compared with the amount of the debt, if this value is chiefly or even partly owing to the buildings thereon, and is therefore liable to be depreciated by fire, the creditor sustains such a relation to the property that he may insure against loss by this injury to his security. And the fact that the debtor has more or less personal property at the time is immaterial. When the creditor concludes to enforce his judgment this personal property may have been destroyed

or disposed of. And so, if the real property to which the lien extends, and upon which the insurance is effected, is then of much greater value than the debt, it may be of much less value before the creditor levies his execution upon it. And, in the mean time, if it should be injured by fire he would sustain a loss which he ought to be allowed to protect himself against by insurance.

But, nevertheless, the lien of a judgment creditor is a general and not a specific one. And, although, as we have seen, circumstances may, in particular cases, make it the same in effect as a specific lien, these are not to be presumed, but must be shown.

The contract for insurance being one for indemnity only, it follows that, while the judgment creditor may insure himself against loss by injury from fire to the whole or any part of his security—the property upon which his judgment is a lien—yet before he can recover on such contract as for a loss sustained by the peril insured against it, it must appear that at the time of the fire the amount of the judgment could not have otherwise been made on an execution against the property of the judgment debtor. If, notwithstanding the injury to debtor's property by fire, he has sufficient left, out of which the judgment may be made, the creditor has sustained no loss, and can recover nothing from the insurer. His contract was against loss to himself by fire, not his debtor.

Now the complaint in this case is silent upon this point. True, it is alleged that the plaintiff sustained a loss by the burning of the warehouse. But as that conclusion does not necessarily follow from the premises, the allegation is not sufficient. The complaint should contain a statement of the facts, showing the plaintiff's right to recover. And as his lien was *prima facie* a general one, on all the judgment debtor's real property, and not a specific one on this warehouse only, and was in effect conditioned on the debtor's want of personal property to satisfy the judgment, the complaint ought to show how the plaintiff sustained a loss by this fire—as that the warehouse was all the property of the judgment debtor subject to execution, or that what was left

would not more than satisfy the remainder of the judgment.

The plaintiff also contends that the defendant, being well aware of the nature of his interest in the property at the time he effected the insurance thereon, is now estopped to say that he had not an insurable interest therein. Conditions and restrictions contained in a policy may be considered waived by a knowledge, on the part of the insurer, of facts inconsistent therewith. In such case, the insurer may be estopped to insist on the condition, as that no other insurance existed on the property. (Wood on F. Ins., sec. 498.) But a contract of insurance, entered into contrary to law or public policy, is simply void, and neither party to it is estopped from showing the fact. "Otherwise the public law and policy would be at the mercy of individual interest and caprice." (*In re Comstock*, 3 Saw. 228.) If the plaintiff sustained no such relation to this property as entitled him to have it insured against injury by fire, his contract with the defendant to that effect was a mere wagering policy, and void, as being contrary to public policy.

But in my judgment, the plaintiff was entitled to insure the property—he had a pecuniary interest in its preservation, and might protect himself against possible loss by its destruction. His was not a wagering policy, as his right to the insurance was conditioned, not simply on the destruction of the property, but also his loss thereby.

However, his interest being that of a judgment creditor, an injury to the property of his debtor was not necessarily a loss to him. That depended upon the condition in which it left the debtor. If he still had sufficient property liable to an execution, wherewith to satisfy the judgment, the creditor lost nothing by the fire. So far as appears, he simply insured against a possible loss, which he was fortunate enough not to sustain; and this is an every-day occurrence.

The demurrer is sustained.

WILLIAM KNOWLTON ET AL. *v.* PHENES MISH ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
APRIL 2, 1883.

1. SEPARATE PROPERTY OF WIFE USED BY HUSBAND.—Where moneys of a married woman are habitually collected and used in his business by the husband for a series of years, and mixed with his property, without any account thereof being kept, thus giving him credit in his business, and there is no specific agreement with his wife for repayment, or, that the property purchased with it shall be hers, the moneys so used, and the goods or property so purchased, become his for the purpose of paying his debts.
2. A MORTGAGE BY THE HUSBAND TO SECURE MONEYS OF THE WIFE SO COLLECTED AND USED, kept from the record till after the purchase and receipt of a large amount of goods by the husband and his son, they being at the time largely insolvent, held to be fraudulent as to the parties selling the goods.
3. FRAUD IS GENERALLY A QUESTION OF FACT, to be determined by all the circumstances of the case.
4. WIFE'S SEPARATE PROPERTY.—A wife desiring to preserve her rights in her separate property, should take reasonable care to keep it distinct from her husband's business, so that it shall not become the means of practising fraud upon others.

Before SAWYER, Circuit Judge.

David Friedenrich, for complainants.

Daniel Titus, for defendants.

SAWYER, Circuit Judge, delivering an oral decision. The bill in this case is brought for the purpose of having appropriated to the payment of debts certain property alleged to have been fraudulently mortgaged and transferred to Mrs. Mish, the wife of one of the defendants. Without going into them fully, a brief outline of the facts is as follows: In December, 1879, P. Mish & Son, a firm doing business in San Francisco, in a certain line of merchandise, was manifestly insolvent—their indebtedness largely exceeding their assets. In that month, P. Mish executed to his wife, a mortgage for the sum of fifty-four thousand dollars, upon property, which was already subject to a mortgage for a

large amount—the two mortgages being more than sufficient to absorb the property. The alleged indebtedness for which this mortgage was given, arose from rents and sales of certain separate property of the wife, which had been given to her by her brother so far back as 1863. For years the husband had been collecting the rents of this property, using the money in his business, and for the support of his family, and for other purposes, and no book-account, or memorandum of it, was kept by either party. At the date mentioned, Mr. Mish and his wife figured up the amount, which they claim he had received from the income of her property, and added a large amount to it as interest, making the total indebtedness fifty-four thousand dollars, for which sum the mortgage referred to was executed.

The mortgage was not put on record at the time. About the time of its execution, the younger Mish left San Francisco for New York, where he purchased for the firm from various parties, upon a credit of several months—four months, I believe—goods to the value of sixty-three thousand dollars—his firm being, then, undoubtedly, insolvent, it being indebted to an amount much larger than the value of all its assets. The goods were purchased during the winter of 1879–80, and immediately shipped to San Francisco. In March, 1880, soon after the arrival at San Francisco, of the last of the goods, Mrs. Mish put her mortgage on record. Immediately afterwards, a suit was brought on behalf of a relative, a brother-in-law of Mrs. Mish, and the stock in the store of P. Mish & Son attached. The stock was sold under execution in that suit, and Mrs. Mish became the final purchaser; she having in the mean time bought up another judgment against the firm. The consequence was, not one cent of this indebtedness of sixty-three thousand dollars referred to, was ever paid, and these complainants being among the sufferers, bring this suit to have the property covered by the mortgage to Mrs. Mish, appropriated to the payment of their debt. The defence is, that this is the separate property of Mrs. Mish. I think no one can read the testimony, and the record in this case, without being

satisfied, that these transactions are fraudulent, with reference to these creditors. It is not necessary for me to go into a discussion of the subject, it would be unprofitable to do so, but, in my judgment, it is, clearly, manifest from the facts, and the surrounding circumstances in this case, as to these creditors, that this transaction between Mish and his wife was fraudulent. A great many ear-marks of fraud are apparent. Fraud cannot usually be proved directly. It is a question of fact to be inferred from the surrounding circumstances. The circumstances in this case, certainly, justify the inference of fraud.

It is highly probable, and for the purposes of this decision I shall assume, that much of this money making up the alleged indebtedness of fifty-four thousand dollars, was income from the wife's separate property. But it was collected by the husband, who used it for such purposes as he saw fit—without any specific agreement in writing, or otherwise, in regard to it —no accounts or traces of it being kept, and he was not called upon to give any account of it, until the time when the mortgage was executed to the wife, under the circumstances named many years after its collection and use; and the execution of the mortgage was kept secret until after the delivery of the last goods bought in New York by the son. The attachment referred to followed so quickly, and under such circumstances, as, at least, to suggest a suspicion of co-operation, and information, on the part of the attaching creditor not possessed by other creditors. I think this point in the case comes clearly within the ruling in the case of *Humes* v. *Scruggs*, 94 U. S. 22–28, where, in the case of such a use of a wife's property as is here shown, under similar circumstances, it was held, that there was a dedication of the money on the part of the wife to the general uses of the husband. I think the circumstances in this case show a dedication to the husband by the wife of the income of her property collected and used by him, so far, at least, as the interests of these creditors are concerned. If married women desire to preserve their rights of property, they should take reasonable care to keep it separate, and in such

condition as not to mislead those dealing with their husbands. They should so manage their property, as not to make it an instrument of fraud upon the rights of others. There must, therefore, be a decree for complainant, in conformity with the prayer of the bill.

THE MINING DEBRIS CASE.

EDWARD WOODRUFF *v.* NORTH BLOOMFIELD GRAVEL MINING COMPANY ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
APRIL 9, 1883.

1. MULTIFARIOUSNESS—NUISANCE.—Several parties owning extensive mines at various points on the affluents of the Yuba River, work them independently of each other by the hydraulic process, discharging their waste earth and other *debris* into the stream whence it flows down into the main river, where the *debris* becomes mingled into one indistinguishable mass, passes on, and is deposited along the course of the river in the valley below, burying valuable lands and creating a public and private nuisance. A bill in equity by a party injured against all the parties thus contributing to the nuisance to enjoin it, is not demurrable as being multifarious, or for a misjoinder of parties, defendant.
2. SAME.—The parties thus creating the nuisance may be joined in equity both on the ground that they co-operate, in fact, and actually contribute to the nuisance, the injury being the single result of the action of the *debris* combined and operating together long before it reaches the place where the injury is effected. Also, on the ground of avoiding a multiplicity of suits.
3. NUISANCES—PARTIES—TENANT IN COMMON.—One tenant in common of land injured by a public and private nuisance, may sue to enjoin the nuisance, without making his co-tenant a party, either as complainant, or defendant.

Before SAWYER, Circuit Judge.

George Cadwallader, *I. S. Belcher*, and *J. Norton Pomeroy*, for complainant.

W. T. Wallace, *S. M. Wilson*, *J. K. Byrne*, and *W. C. Belcher* for defendants.

SAWYER, Circuit Judge. This is a bill brought against a number of hydraulic mining companies, severally owning

mines at various points on the Yuba river, and its tributaries; and working them independently of each other, to restrain them from discharging the gravel, waste earth, and mining *debris* arising from working their several mines into the streams.

It is alleged, generally, that complainant has been for twenty-four years, and that he is, now, the owner of an undivided half of three several parcels of land, situated on Feather river, and in the city of Marysville on the Yuba river; that the defendants, severally, own large mines situate at various points on the Yuba river and its affluents, which they are, respectively, working by the hydraulic process, by means of which, the gravel, waste earth, and other *debris* arising therefrom, are discharged into the several streams on which the mines are situated; that vast quantities of this *debris* are carried by the rapid currents of the waters down the various streams into the Yuba river, where they commingle before reaching the valley, and after thus uniting flow along the main Yuba through the valley past Marysville into Feather river, thence to the Sacramento, making large deposits along the courses of these rivers, which have buried from two to fifty feet deep, and, utterly destroyed, forty thousand acres of the most valuable lands, heretofore cultivated; and made it necessary to the citizens, including the complainant, to construct levees of great extent, to prevent the remaining lands bordering on the streams mentioned from being, in like manner, covered up and destroyed; that the deposits within the levees have already raised the level of the beds of the streams many—in some cases fifty—feet, and that the constant raising of the level of the beds of the streams, and the lands already buried in the *debris*, renders it necessary to constantly increase the height of the levees, at great expense to the people, and the complainant; that the navigation of Feather river has been greatly obstructed by these deposits, to the great inconvenience of commerce and navigation, and damage to the complainant, and the public; that these deposits constitute a great public and private nuisance, which nuisance is rapidly increasing and becoming more intolerable; that these operations of defend-

ants are still continued, and will be continued; and that the destruction of the property of complainant and others, will take place, and irreparable injury result, unless the defendants are restrained by injunction.

Defendants demur to the bill; and the two points relied on, are misjoinder of defendants, and multifariousness in this: 1. That each defendant is pursuing its business, severally, without any connection with the other, and without any joint intent or joint action; that the cause of action is distinct, and several, as against each, and neither the defendants, nor the several causes of action can be joined in the same suit. 2. That the co-tenant of the complainant is a necessary, or, indispensable, party to the suit; and that the suit cannot be maintained without making him a party either as plaintiff, or defendant.

After a very careful examination and analysis of the numerous authorities cited on the first point, I am entirely satisfied, that, under the principles of equity jurisprudence, as established in England and the United States, adopting that system, there is no misjoinder of defendants; and that the bill is not multifarious in the particulars suggested.

It is true, that each defendant is, independently, working its own mines, without any conspiracy, or preconcert of understanding, or action, with the others; but they all pour their mining *debris* into the several streams, which they know, must, by the force of the currents, be carried down into the main river, where they must commingle into one indistinguishable mass long before they reach the point where the nuisances complained of are committed, and the damages are created. This commingling of the *debris* discharged into the various streams by the several defendants, and passing on to work the destruction alleged—this aggregation of waste material, which, after aggregation, is precipitated upon the plains below, and creates the nuisance, is the necessary and natural consequence of the action of the several defendants; and they must, respectively, be presumed to know, and to contemplate, these natural, and known, physically necessary, results. The nuisance is created by the joint action of the *debris* from the various

mines, which is combined, and, afterwards, flows on together, long before it reaches the lands injured, and threatened, and after such combination creates the nusiance complained of. There is, therefore, a co-operation in fact, if not in intent, of these several defendants in the production of the nuisance. The injury is the joint effect of acts, originally, several, but combined before the *debris* is precipitated upon the lands below, and the injury is effected; and, in contemplation of equity it constitutes a single cause of action. There is a common interest in the right claimed to discharge *debris* into the streams. The defendants each and all claim a common, though not a joint right. The final injury is a single one—a single result of the combined operation of this *debris*—and all the defendants co-operate in fact in producing it. No damages are sought. Only equitable relief is demanded, by restraining future action—a future contribution by each to the nuisance.

In *Thrope* v. *Brumfitt*, 8 L. R., Ch. Appeals, 656, a bill was supported against several parties acting individually, and severally, in blocking up the passage to an inn, by loading and unloading wagons in it, in the prosecution of their several callings. Lord Justice James said: "Then it was said, that the plaintiff alleges an obstruction, caused by several persons acting independently of each other; and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to use the way *has a right to prevent;* and it is no defense to any one person among the hundred to say, that what he does causes no damage to the complainant." A decree granting a perpetual injunction in the case was affirmed. In my judgment, the present case is a much stronger one for sustaining the bill. The nuisance

in that case was not, so clearly, a joint single effect of the acts of defendants co-operating together as that in this. In that case what each one did, continued distinct and separate, and could be readily ascertained, though the share of the damages might be indefinite. In this the deposits are commingled and indistinguishable, before the nuisance is committed, and the action affecting the nuisance is joint.

Chapman v. *Palmer*, 77 N. Y. 56, expressly recognizes the rule, that "an equitable action will lie to restrain parties who *severally* contribute to a nuisance," while it holds that they cannot be joined in an action at law. So does *Crossly* v. *Lightowler*, 3 L. R. Eq. 279, and *Duke of Buccleugh* v. *Corran*, 5 Macph. 214. See *White* v. *Jameson*, 18 L. R. Eq. 303. *Keyes* v. *Little York G. W. & W. Co.*, 53 Cal. 724, it must be admitted, decides the exact question now under consideration in favor of the defendants; and I cannot overlook that case. With all proper deference to the court rendering the decision, I am compelled to say, that I think the importance of the distinction between proceedings at law and in equity, with reference to the question involved, and the facility with which a court of equity can adjust its decrees, so as to meet every requirement of justice, either did not attract due attention, or was not duly appreciated. There is a very great difference between seeking to recover damages at law, for an injury already inflicted by several parties, acting independently of each other, and restraining parties from committing a nuisance, or from contributing to create, or increase, a nuisance in the future. In equity the court is not tied down to one particular form of judgment. It can adapt its decrees to the circumstances in each case, and give the proper relief as against each party, without reference to the action of others, and without injury to either. Each is dealt with, with respect only to his own acts, either as affected or unaffected by the acts of the others. It is not necessary for the purpose of prevention of future injury, to ascertain what particular share of the damages each defendant has inflicted in the past, or is about to inflict in the future. It is enough to know that he has contributed, and is continuing to contribute to a nuisance, without ascertaining

to what extent, and to restrain him from contributing at all. But if otherwise, I do not perceive why the proportion of the injury inflicted by each may not be ascertained when practicable, and the decree adapted to give a proper remedy as to each. The greater elasticity in the forms and modes of proceedings in equity, enables the court to so mold its decrees, as to meet the special circumstances of each defendant, and thus do entire justice to many parties, under circumstances wherein a judgment at law would be wholly inadequate—circumstances which would render it impracticable to unite them in one action in that form of proceeding. And this is the foundation of the well-established distinction between law and equity, with reference to the joinder, and non-joinder, of parties in the same proceeding. The very object of establishing courts of equity, was to furnish a tribunal adapted to do complete justice in complex cases, often involving many parties in which the courts of law, by reason of their restricted powers resulting from their modes of proceeding, could not afford adequate relief. No inconvenience, or additional costs, can result to the several defendants in this suit from being joined with others, who also contribute to the same nuisance by originally independent action—action in its inception and first stages several, but ultimately co-operating to produce the nuisance. On the contrary, it is convenient to dispose of it in one case, and the costs are diminished to each individual, rather than increased by a single suit. The costs can be apportioned in equity, if proper, and the administration of justice is thus facilitated. In fact, it is the only adequate mode of proceeding in cases like this. In my judgment, the decision in Keyes' case is not in accordance with the principles of equity jurisprudence in England, or generally, in the United States, as established by the authorities. I also regard the case as substantially overruled by the present supreme court in the subsequent case of *Hillman* v. *Newington*, 57 Cal. 56. It is true, the case of Keyes was not mentioned by the court in its opinion in the latter case; but it was the principal case cited, and relied on by counsel.

The case of Keyes could not have been overlooked by the

court, and there does not appear to have been any attempt to distinguish it; and it seems to me, to be utterly inconsistent with the decision in *Hillman* v. *Newington*, and to have been, in effect, overruled by the latter case. The difference between these cases is only in circumstance, not in principle. The action in the latter case was for diversion of water by several defendants, each acting independently. It was both an action at law, for damages, by a party entitled to a specific amount of water, and also a suit in equity, to restrain the diversion complained of. The point most strongly pressed in the supreme court was the alleged misjoinder. The court says: "Each of them (the defendants) diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that without unity, or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly. * * * It does not seem to us that the defendant's answer, that each one of them is acting independently of every other one, shows that the wrong complained of is not the result of their joint action; and if it does not, the answer in that respect is insufficient to constitute a defense." The judgment at law was modified so as to *apportion the damages and costs equally among the defendants;* and affirmed as to the injunction. Even the action *at law was thus sustained.* If in that case, "all who act must be held to act jointly," and "the wrong complained of is the result of their joint action," I cannot perceive why, for the purpose of equitable jurisdiction, the same consequences should not follow in the Keyes case, and in the case now under consideration. In this case the action of any one defendant, or any one of many other miners, alone, might not, and probably would not, produce any appreciable effect at complainant's locality, or occasion the slightest nuisance or injury.

In that case is it not "quite" as "evident, therefore, that, without unity or concert of action, no wrong could be committed"? and is it not equally a case, where "all who act must be held to act jointly"? If not, why not? It devolves

upon those who maintain the contrary to clearly show why not.

So *Blaisdell* v. *Stephens*, 14 Nev. 22, was a combined suit at law, to recover damages, which had already resulted from a nuisance, and, in equity, to restrain its continuance. The two defendants, Sessions and Stephens, each separately, and independently of the other, allowed water to run from his lands upon the lands of the plaintiffs, the combined action of which injured plaintiff's ditch, which constituted the nuisance complained of. There was a *joint* judgment for the damages, and an injunction. On appeal, the supreme court held, that the acts of each party being independent of the other, there was no joint liability at law; and reversed the judgment, and ordered a new trial. Upon a petition for rehearing, it was insisted that it was a proper case for equitable relief, even if the judgment at law could not be maintained. And upon a re-examination of the case, the court finally held, in accordance with the authorities, that there could be no joint recovery at law, for the damages, but that it was a proper case for an injunction; and remanded the case with directions, that, if the damages should be remitted within fifteen days, the decree for an injunction should stand. That case is exactly in point, also, and shows that this case is a proper one for an injunction, although there may not be a right to recover joint damages at law—that there is no misjoinder of parties, and no multifariousness in equity. That case, also, fully answers the question so confidently propounded by defendants' counsel, whether, had this case been brought in a state court, where law and equity are administered in the same case, at law, for damages, and in equity for an injunction, and been transferred to this court and divided into two suits according to its practice, this court would have dismissed the action at law for misjoinder of defendants, but have retained the equity branch, notwithstanding the objection on the ground of misjoinder and multifariousness? This is just what the supreme court of Nevada did, even without dividing the case into two suits. There are

many other authorities, not necessary to mention, tending more or less strongly and directly, to the same conclusion.

I also think this bill maintainable against all the defendants on the jurisdictional ground of avoiding a multiplicity of suits. There is a common interest, a common, though not joint, right, claimed; and the action on the part of all the defendants is the same, in contributing to the common nuisance. The rights of all involve and depend upon identically the same questions, both of law and fact. It is one of the class of cases, like bills of peace, and bills founded on analogous principles, where a single individual may bring a suit against numerous defendants, where there is no joint interest, or title, but where the questions at issue, and the evidence to establish the rights of the parties, and the relief demanded, are identical. Without analyzing and discussing the numerous cases upon the subject separately, this case appears to me to be clearly within the principle stated in, and established by the following, and many other authorities that might be cited. (1 Pomeroy's Eq., sec. 256–269, and notes. In this and the preceding sections, Professor Pomeroy clearly analyzes and satisfactorily classifies the cases on this subject. *Mayor of York* v. *Pilkinton*, 1 Atk. 283–284; *Sheffield Water Works* v. *Yeomans*, L. R., 8 Ch. 8, 11; *Ware* v. *Howard*, 14 Ves. 28–33; *Board of Sup.* v. *Deyoe*, 77 N. Y. 219; *Schuyler Fraud Cases*, 17 N. Y. 592; *Cent. P. R. R. Co.* v. *Dyer*, 1 Saw. 650; *Gaines* v. *Chew*, 2 How. 642; and *Oliver* v. *Piatt*, 3 Id. 412.)

In *Gaines* v. *Chew*, the supreme court of the United States says: "It is well remarked by Lord Cottenham, in *Campbell* v. *Mackay*, 7 Sim. 564, and in 1 My. & C. 603, 'to lay down any rule, applicable universally, or to say, what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible.' Every case *must be governed by its own circumstances;* and as these are as diversified as the names of the parties, *the court must exercise a sound discretion* on the subject. Whilst parties should not be subject to expense and inconvenience, in litigating matters in which they have no interest, *multiplicity of suits should be avoided, by uniting in one bill all who have an interest*

in the principal matter in controversy, though the interest may have arisen under distinct contracts."

And this is substantially repeated in *Oliver* v. *Piatt*, 3 How. 412. Thus it is seen, that there is no iron, inelastic rule, on the subject of multifariousness; but "every case must be governed by its own circumstances," and the court must exercise a *sound discretion on the subject.* Are not *all* these defendants "interested in the principal matter in controversy"? Nay, in the only matter in controversy? Are not the law, and the facts and the evidence to establish the controlling facts, and the relief demanded against each, identical as to all? Then, why, under the injunction of the supreme court, should they not all be united in one bill for the purpose of avoiding a multiplicity of suits? In my judgment, if the bill does not present a case precisely like any other found in the books, it, nevertheless, presents one within the principles laid down; and one that a court of equity, in the exercise of a sound, judicial discretion, is required to entertain—one that it can not rightfully or properly refuse to entertain. It violates none of the limitations suggested in *Gaines* v. *Chew.* It will not subject the different parties to "expense or inconvenience in litigating matters in which they have no interest," but a "multiplicity of suits" is avoided by joining the several defendants, all of whom are interested in the only controversy in the action. The controlling facts are the same; the evidence to establish them is identical; the right claimed, and the questions of law, are one and the same; the same relief is asked against all; they all contribute to the same nuisance complained of, and there can be no more inconvenience, and little more expense in determining all the rights of all the parties in one suit, than would be required in each suit in determining them in several independent suits. The expense to each individual will be greatly diminished. While to require the complainant to pursue each defendant separately would be to put upon him a burden so impracticable, and onerous, as to amount to an absolute denial of justice. If each contributor to the nuisance must be sued separately, then there is no adequate remedy for such an injury. The

locality of the nuisance is the common point, like the point of convergence in an hour-glass, upon which the previously aggregated results of the originally independent acts of the several defendants concentrate, and jointly operate, and from which the joint effects again radiate, and distribute themselves upon all within the reach of their influence. I can perceive no sound reason in the established principles of equity jurisprudence and practice, why two or more of the parties injured by the common nuisance, should not be permitted to unite, and two or more of those co-operating to commit it, should not be joined in one suit, to redress the injury, and enjoin a continuance, or increase of the nuisance, thus in common inflicted, and in common sustained. To my mind this bill presents a much stronger case for joinder of all the defendants, than *Gaines* v. *Chew*, *Oliver* v. *Piatt*, *Dyer* v. *C. P. R. R. Co.*, or indeed, a large majority, if not all, of the cases to be found in the books establishing the rule invoked. As counsel for complainant well observed, if there is found in the books no precedent precisely like the case in hand, in all its circumstances, it must be because no case, except that of Keyes, exactly like it has been presented to the courts for adjudication, and the time and the occasion have now come to make one. I think the bill not demurrable, on the ground of misjoinder of defendants or multifariousness.

I am satisfied, also, that the complainant is entitled to maintain the suit without joining his co-tenant, or making him a defendant. His interest, his estate, is several. There is but a unity of possession. His interest, or estate, is capable of being injured, and he is entitled to have it protected from irreparable injury, whatever course his co-tenant may see fit to pursue. He claims nothing against his co-tenant. The co-tenant is not an indispensable party to a determination of his rights. In this state, both before the code, under the common law rules, and after the adoption of the code, by express provision carrying the former rule into it, it was settled that tenants in common could sue alone. In *Goodenough* v. *Warren*, 5 Saw. 497, a suit to quiet title, it was held that one tenant in common, made a

defendant, could remove the case from a state court to the circuit court of the United States, on the ground that there was a controversy wholly between him and the plaintiff, which could be fully determined, as between them, without the presence of other parties.

The same ruling was made in *Field* v. *Lownsdale*, 1 Deady, 289. In *Dent* v. *Turpin*, 2 John. & H. 139, and in *Southern* v. *Reynolds*, 12 Law Rep. (L. T. R.) [75], it was held, that a co-tenant in the right to the use of a trade-mark, might maintain a bill to restrain its use without joining, or making his co-tenant, a party. In *Payne* v. *Hook*, 7 Wall. 431, it was held, that one of the heirs of an estate could maintain a bill against an administrator and his sureties, to obtain relief against fraudulent proceedings; for an account, and for her share of the estate, without making the other heirs parties to the bill. The other heirs were named in the bill, but it was not stated of what state they were citizens. The court says: "It can never be indispensable to make defendants of those against whom nothing is alleged, and from whom no relief is asked. A court of equity adapts its decrees to the necessities of each case." (432.) The present case is a stronger one for permitting the co-tenant to sue alone, as there is no account in which others are interested, required. But this point is fully settled by the supreme court of the United States in *Mississippi and Missouri Railroad Co.* v. *Ward*, 2 Black, 485. The suit was brought by Ward, a tenant in common of three steamboats, to enjoin a nuisance, without making his co-owners parties complainant, or defendants. Says the supreme court in deciding the case: "Ward was the part owner of these steamboats—and commander of one of them—navigating the river in successive trips between St. Louis and St. Paul; and which boats, the complainant alleges, were much injured and delayed by the bridge, which he avers is a great obstruction to navigation—amounting to a prominent nuisance. It is insisted *that Ward cannot sue alone, and could only come before the court jointly with the other part owners of the vessels injured and delayed.* He seeks no damages by his bill, but only an abatement of the nuisance, as a preventive remedy

against future injury and delay. A bill in equity to abate a public nuisance filed by one, who has sustained damages, has succeeded to the former mode in England of an information in chancery, prosecuted on behalf of the crown, to abate, or enjoin the nuisance, as a preventive remedy. The private party sues, rather as a public prosecutor, though on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others, who are, or may be injured; *nor is there more necessity for joining partners in the prosecution, than there is for his joining in the suit any other person, as complainant, who has sustained injury.* Gibbons on Dilapidation, 402." This decision exactly covers the point under consideration, and is authoritative. None of the points of the demurrer relied on are tenable.

The demurrer to the bill must, therefore, be overruled, and it is so ordered, with leave to answer on or before the next rule day of this court.

THE PEOPLE OF THE STATE OF CALIFORNIA EX REL. CHARLES G. BUNKER *v.* PACIFIC MAIL STEAMSHIP COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
APRIL 16, 1883.

CONSTITUTIONAL LAW—REGULATION OF COMMERCE.—Section 2955 of the political code of California, so far as it requires the payment of seventy cents for each passenger, inspected to ascertain if he is afflicted with leprosy, coming into the United States by sea, and imposing a fine for non-payment upon the owners and consignees of the vessel bringing the passengers, is unconstitutional and void.

Before SAWYER, Circuit Judge.

W. W. Morrow, Esq., for Charles G. Bunker.

Milton Andros, Esq., for defendant.

SAWYER, Circuit Judge, delivering an oral decision. This is a demurrer to the complaint. The action is brought to recover eight thousand dollars, fees claimed to be due the state immigration commissioner for inspection of passengers. The political code of the state of California provides for the inspection of all passengers who arrive in this state from foreign countries by steamer, or other vessels, for the purpose of ascertaining whether any one or more of such passengers are afflicted with elephantiasis or leprosy; and provides that the owner, captain, or consignee of the vessel shall pay to the commissioner who makes the inspection the sum of seventy cents for each passenger so inspected, whether he is found to be suffering from this disease or not. It is also provided that the excess so collected over four thousand dollars and expenses, as compensation for the commissioner, shall, when required for the purpose, be paid into the treasury of the state, for the purpose of building a place where the persons afflicted with this disease shall be kept and taken care of, so that they shall not come in contact with the other people of the state.

It is contended that this provision of the code is unconstitutional; that it interferes with the regulation of commerce.

I am unable myself to distinguish the case here presented from that of the *People of the State of New York, Plaintiffs in Error*, v. *The Campagnie Générale Transatlantique*, decided a few days ago by the supreme court of the United States. It seems to me that that decision covers this case precisely. In the head notes of that decision it is stated that a New York state statute imposed a tax of one dollar on every passenger from a foreign country brought into New York upon vessels, under what is called an inspection law, which authorizes passengers to be inspected with reference to their being criminals, paupers, lunatics, orphans, or infirm persons, liable to become a public charge, with a view of preventing such persons from coming into the state, and with a view of returning them to the country from which they came. This tax was levied to pay the expense of inspection, and for such other purposes as might be provided. The

statute is held to be a regulation of commerce within the exclusive power of congress. In the head notes is the following language: "The tax is not relieved from this constitutional obligation by saying, in the title of the statute, that it is in aid of a law called an inspection law, which authorizes passengers to be inspected with reference to their being criminals, paupers, lunatics, orphans, or infirm persons liable to become a public charge."

The title of the New York statute is: "An act to raise money for the execution of the inspection laws of the state of New York." The first section provides: "There shall be levied and collected a duty of one dollar for each and every alien passenger who shall come by vessel from a foreign port to the port of New York, for whom a tax has not heretofore been paid, the same to be paid to the chamberlain of the city of New York by the master, owner, agent, or consignee of every such vessel within twenty-four hours after the entry thereof into the port of New York." In the decision in the case referred to I find the following: "The argument mainly relied on in the present case is, that the new statute of New York, passed after her former statute had been declared void, is in aid of the *inspection laws of the state.* This argument is supposed to derive support from another statute passed three days earlier, entitled 'An act for the inspection of alien emigrants and their effects by the commissioners of emigration.'"

The fact that there are two different statutes makes no difference. One refers to the other, and they are to be construed together as one statute. In its decision the court goes on to say: "This act empowers and directs the commissioners of emigration 'to inspect the persons and effects of all persons arriving by vessels at the port of New York from any foreign country, as far as may be necessary, to ascertain who among them are habitual criminals, or paupers, lunatics, idiots, or imbeciles, or deaf, dumb, blind, infirm, or orphan persons, without means or capacities to support themselves, and subject to become a public charge, and whether their persons or effects are affected with any infectious or contagious disease, and whether their effects

contain any criminal implements or contrivances.' * * * These two statutes, construed together, it is argued, are inspection laws within the meaning of article 1, section 10, clause 2, of the constitution of the United States, to wit: 'No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'"

Then the court goes on to discuss the question, and holds that this is not an inspection law within the meaning of the constitutional provision; that the inspection laws refer to the importation of goods and not to passengers. The court then proceeds: "It is apparent that the object of these New York enactments goes far beyond any correct view of the purpose of an inspection law. The commissioners are 'to inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals, or paupers, lunatics, idiots, or imbeciles, * * * or orphan persons, without means or capacity to support themselves, and subject to become a public charge.'"

The object of the statute of this state is substantially the same, to provide for the inspection of passengers to ascertain whether any of them have a particular disease.

"Another section," the court says, "provides for the custody, the support, and the treatment for disease of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection? In fact, these statutes differ from those heretofore held void only in calling them in their caption 'inspection laws,' and in providing for payment of any surplus, after the support of paupers, criminals, and diseased persons, into the treasury of the United States—a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say, will never exist. A state cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title." So if you christen it a police regula-

tion, or by any other name, it will make no difference. It is not an inspection law.

The present case comes precisely within this case referred to, in my view. I dispose of it upon that ground.

These acts alleged in the complaint in this case, have occurred since the third day of August, 1882. But, in the case referred to, the court intimates that congress has passed a law which, if it did not cover these cases before, cuts up this whole subject by the roots. In the decision it is stated: "Since the decision of this case in the circuit court, congress has undertaken to do what this court has repeatedly said it alone had the power to do. By the act of August 3, 1882, entitled 'An act to regulate immigration,' a duty of fifty cents is to be collected, for every passenger not a citizen of the United States, who shall come to any port within the United States, by steam or sail vessel, from a foreign country, from the master of said vessel by the collector of customs. The money so collected is to be paid into the treasury of the United States, and to constitute a fund to be called the immigrant fund, for the care of immigrants arriving in the United States, and the relief of such as are in distress. The secretary of the treasury is charged with the duty of executing the provisions of the act and with supervision over the business of immigration. No more of the fund so raised is to be expended in any port than is collected there. This legislation covers the same ground as the New York statute, and they cannot co-exist."

Under that decision, I think that this provision of the political code of California, is unconstitutional, and the defendants are not liable to pay the amount named, seventy cents, for the passengers examined, or the fine imposed for non-payment.

The demurrer is sustained, and judgment will be entered for defendants on the demurrer.

PACIFIC COAST MINING AND MILLING COMPANY *v.* JAMES SPARGO ET AL. SAME *v.* L. FICK ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
APRIL 16, 1883.

1. PATENT TO LANDS EMBRACING MINES.—Where a patent to lands is issued by the United States, it carries all mines in the lands patented, to which no right has attached at the time the patent issues.
2. PATENT—COLLATERAL ATTACK.—The validity of a patent cannot be questioned collaterally, in an action to recover the land patented.
3. PATENT RELATES TO ENTRY.—Where a purchaser enters and pays for a tract of public lands, receiving a certificate of purchase therefor, the patent, subsequently issued in pursuance of such certificate, relates to, and takes effect from, the date of the entry.
4. RESERVATION IN PATENT OF RIGHT TO WORK A MINE.—Where a patent to public land, reserves the right of a proprietor of a mining vein or lode, to extract and remove his ore therefrom, should it be found to penetrate, or intersect, the lands granted by the patent, the reservation refers only to parties who are proprietors at the time when the right of the patentee attaches to the land, or the date of the entry, or patent.

Before SAWYER, Circuit Judge.

Garber, Thornton & Bishop, and F. W. Cole, for plaintiff.

C. W. Cross, for defendants.

SAWYER, Circuit Judge. In the first case, the grantor of plaintiff entered and paid for the land described in the complaint, at the rate of one dollar and twenty-five cents per acre, at the proper land office, and received his certificate of purchase on December 19, 1874. In pursuance of his purchase, a United States patent in the usual form issued to him on September 6, 1876. In March, 1880, the grantors of defendants located, in the usual way, a gold-bearing quartz lode, under the surface on the land in question, which they, and the defendants, worked under ground, by means of a tunnel extended into it from without the boundaries of the land. Defendants claim title under this mining location. The patent to the plaintiff's grantor contained the clause: "Subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes,

and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and, also, subject to the right of *the proprietor of a vein or lode*, to extract and remove *his ore* therefrom, should the same be found *to penetrate, or intersect, the premises hereby granted as provided by law.*" Defendants insist that the mine, subsequently located, is embraced in this provision, "also subject to the rights of the proprietor of a vein or lode, to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law." The language of exception, strictly construed, seems to refer, only, to mines located outside the lands, which, by their dip or inclination, penetrate, or intersect the land patented, and not to mines discovered, and located within it.

But however this may be, the language certainly does not mean, parties claiming to be "proprietors," who locate mines after the issue of the patent, but only persons who are "the proprietors" of mines at the time when the patentee's rights attached. When the patent issues, it covers everything embraced in the land to which no prior right has attached, otherwise the patent would not have reserved the rights of "the *proprietor* of a vein," but would have reserved *the vein itself*. There can be no rights of a "proprietor," to reserve unless there is a proprietor who has rights to protect, at the time the reservation is made. The patent passed the entire title as against any subsequent locator, and that being so, no legal right could be acquired against the patentee by a subsequent location. No man could become the proprietor of a mine already granted, except by purchase from the grantee. The patent cannot be attacked collaterally in this action. The land officers were charged with the duty of ascertaining whether the lands were subject to be patented or not, and their determination is conclusive, at least, in this action. The case of *Steel* v. *St. Louis Smelting and Refining Co.*, decided at the present term of the supreme court, is emphatic on this point. But the same principle has been established by numerous prior

decisions of that court. (*Smelting Co.* v. *Kemp*, 104 U. S. 636; *Quinby* v. *Conlan*, Id. 426; *Moore* v. *Robbins*, 96 Id. 530; *Shepley* v. *Cowan*, 91 Id. 330; *Johnson* v. *Towsley*, 13 Wall. 72; *Vance* v. *Burbank*, 101 U. S. 519.) In the other case against Fick *et al.*, the grantor of the plaintiff entered the land, paid for it, and received his certificate of purchase on December 19, 1874.

The mining location of defendants was made August 14, 1875, while the patent issued upon the certificate of purchase is dated September 6, 1876. The difference between this and the other case is, that in this case the mining location was made after the entry and payment for the land, but before the patent issued; while in the other, the mining location was not made till after the patent issued. But this can make no difference in the rights of the parties. The purchaser became the equitable owner of the land the moment he entered and paid for it, and received his certificate of purchase. From that time the United States had no real interest in the land. It only held the dry legal title in trust for the purchaser, pending the usual necessary delay in issuing patents, and the patent only perfected the title, the right to which had already vested. Lands cease to be public lands when entered and paid for. (*People* v. *Shearer*, 30 Cal. 648; *Gwynne* v. *Niswanger*, 15 Ohio, 368; *Astrom* v. *Hammond*, 3 McLean, 108; *Carroll* v. *Perry*, 4 Id. 26; *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210, 219; *Hughes* v. *United States*, Id. 323; *U. M. & Mi. Co.* v. *Danberg*, 2 Saw. 455.)

When the patent finally issues it attaches itself to the entry, and relates to the date of the entry. It is regarded for the purpose of protecting the rights of the patentee against parties seeking to acquire intervening rights, as if issued at the date of the entry. The entry and patent are regarded as one title. (*Bagnell* v. *Broderick*, 13 Pet. 450, 451; *Gibson* v. *Choteau*, 13 Wall. 93; *Shepley* v. *Cowan*, 91 U. S. 337; *Smelting Co.* v. *Kemp*, 104 Id. 647; *Hayner* v. *Stanley*, 8 Saw. 225.) The title of the plaintiff dates from the date of the entry and payment, and not from the date

of the patent; and the reservation in the patent relates to that date, and, therefore, antedates the mining location of the defendants. The plaintiff in each case has the legal title to the mine, as well as the land, and is entitled to recover the lode from which it has been ousted, and it is so ordered.

A. BALFOUR ET AL. *v.* E. L. SULLIVAN, COLLECTOR.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.
APRIL 16, 1883.

1. DUTIES—SHRINKAGE IN WEIGHT.—Where a cargo of coke, imported from Wales, by reason of evaporation of the moisture contained in it during the voyage, weighed several tons less than when shipped: *Held*, that duties could only be legally collected on the actual weight at the time of the importation, and not on the weight shown by the invoice.
2. REGULATION OF THE SECRETARY OF THE TREASURY.—A regulation of the secretary of the treasury, that duties shall be collected according to the invoice, unless the importer accounts, by proofs, for the discrepancy between the amount shown by the invoice and the actual weight at the time of importation, is no defense to an action to recover the duties exacted from the importer on the difference between the amount actually imported, and the amount shown by the invoice to have been shipped.

Before SAWYER, Circuit Judge.

Charles Page, for plaintiffs.

Teare, United States attorney, for defendant.

SAWYER, Circuit Judge. The plaintiffs, Balfour, Guthrie & Co., in January, 1882, imported into San Francisco, from Cardiff, Wales, a cargo of coke, which, upon its arrival and entry, was duly examined and weighed, by the proper custom house officers; and was found, and so reported, to actually weigh one thousand and ninety-nine tons, four centals two quarters, and twenty-six pounds. The weight, as set forth in the invoice which accompanied the importation, was one thousand one hundred and forty-six tons, and sixteen centals. The amount of duties payable on the weight shown by the invoice, is one thousand one hundred and

thirty dollars and fifty cents; while that payable according to the actual weight is one thousand and eighty-five dollars and fifty-nine cents—making a difference of forty-four dollars and ninety-one cents. The collector demanded and collected the amount due according to the weight shown by the invoice, instead of the actual weight, which sum was paid by plaintiffs under protest, in order to obtain possession of the coke. The importers appealed to the secretary of the treasury, who affirmed the action of the collector; and this action is brought to recover the excess of forty-four dollars and ninety-one cents, so collected, on the ground that duties could only be legally collected upon the weight of the coke actually imported. Coke is a porous substance, subject to change in condition, by increase of weight in a moist, and decrease in a dry, atmosphere. Article 532, of the regulations of the treasury department, adopted in 1874, is as follows: "No allowance will be made in the estimate of duties for lost or missing articles or packages appearing on the invoice, unless shown by proof satisfactory to the collector and naval officers, not to have been originally laden on board, or to have been lost or destroyed, by accident, during the voyage."

The proofs required by the foregoing regulation were not made by plaintiffs, they insisting that no proofs were requisite under the law, other than the amount of coke actually imported into the United States.

The case does not appear to fall within the language of the regulation. There were no "articles or packages appearing on the invoice lost or missing," nor was it claimed that there were. The coke shown by the invoice was all "originally laden on the vessel," and none of it was lost or destroyed by accident during the voyage. So it was impossible to make the required proof had it been necessary. Yet the whole amount of weight was not in fact imported. The diminution in weight is believed to have resulted from evaporation of moisture in the coke. In *Marriott* v. *Brune*, 9 How. 619, a case of importation of sugar which had lost largely in weight by drainage, the duties on the invoice weight were collected; but the supreme

court held that duties could only be collected on the weight actually received. Says the court: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight that arrives here; that is, what is *imported*, for nothing is imported till it comes within the limits of a port." * * * "As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of congress to be extended, so as to embrace more. * * * A deduction must be made from the quantity shipped aboard, whenever it does not all reach the United States, or we shall, in truth, assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of congress, nor required to enforce just right."

"It is also the quantity actually received here, by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. It is all he can re-export for drawback." (9 How. 632. Affirmed in *United States* v. *Southmayd*, Id. 646.) The same rule was upheld in regard to brandy in *Lawrence* v. *Caswell*, 13 Id. 488. So the weight of tea, as actually imported, was adopted as the proper basis for collecting duties, in *United States* v. *Nash*, 4 Cliff. 107. See, also, *Schuchard* v. *Lawrence*, 3 Blatchf. 397.

But if the case is within the terms of the regulation, it is difficult to see where the secretary obtains authority to require what the statute does not. Is it not enough, that it affirmatively appears what amount of goods is actually brought into the United States, without showing *why* more was not imported? As was well said by counsel, "the *cause*, and not the *fact of non-importation*, is made the ground

of relief from the impost to the merchant." Duties are levied under the statute, and the decision of the supreme court construing the statute upon the amount of goods actually imported; and when it is shown what amount is, in fact, actually imported, the importer, certainly, cannot be required by regulations of the secretary to show affirmatively why he did not import more, as a condition of being relieved from paying duties upon goods, which it appears he did not, in fact, import. Some express authority should be shown for establishing such a burdensome rule. In many cases it would, doubtless, be impossible for the importer to show, affirmatively, what had become of his goods; and if it appears that they have not been imported, that should be sufficient. At all events, independent of some act of congress to the contrary, if an importer, under such a rule, adopted for the convenience of the department, is compelled to pay duties, against *his protest*, on goods never imported, the rule cannot avail as a defense to an action to recover the money thus, wrongfully, exacted. The only statute cited, as justifying the regulation, is section 251, R. S., which provides that the secretary of the treasury "shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not *inconsistent with law*, to be used under and in execution and enforcement of the various provisions of the internal revenue laws, or in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports." This certainly does not authorize the collection of duties on goods not in fact imported, unless the importer of goods shows, affirmatively, why he did not import more. Nor does it authorize a regulation which shall prevent an importer from recovering moneys illegally exacted from him on goods never imported. To thus adopt a rule by which duties are collected on goods not imported, when under the statute only duties on goods, in fact, imported are authorized to be collected, would be to adopt a regulation "inconsistent with the law." Section 2921 of the revised statutes expressly provides that "if on the opening of any package a deficiency of any article shall be found on examination by the appraisers, the same shall

be certified to the collector on the invoice, and an allowance for the same shall be made in estimating the duties." And section 2920 provides for weighing and measuring when there is a deficiency. The importer is not required by the statute to show why there is a deficiency, or how it occurred, as a condition of not paying duties on more goods than he has, actually, imported. He is entitled under the statute to the exoneration, upon the fact of deficiency appearing. Other penalties are provided by law for certain cases. (See *Gray* v. *Lawrence*, 2 Blatchf. 117; *Lening* v. *Maxwell*, Id. 126.) No other statute authorizing such a rule, or the exaction of the duties sued for has been brought to the notice of the court.

I think plaintiffs entitled to recover the amount claimed, and judgment will be entered accordingly.

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5. IDEM—OFFER OF, WHEN SUFFICIENT.—The bark *Whistler* was approaching the mouth of the Columbia river, with intent to enter and load there as soon as one of the three pilot tugs stationed there should come out to her without orders to go elsewhere; and being met by one of said tugs without such orders, she was taken in tow thereby and went in, but on the day before, and while she was standing off and on about thirty miles from the bar, she was hailed by an Oregon schooner pilot, who tendered his services to pilot her in, which were refused. *Held*, that the vessel was "bound in the river," within the meaning of the statute giving full pilotage for the offer and refusal of such services, and having afterwards gone in, the libellant became entitled to such pilotage. *Id.*
6. COLLISION.—Where a steamer and schooner came into collision, the schooner having been seen approaching a mile and a half distant, the steamer was held to be in fault and liable. *Steamer Ancon* v. *Thompson*, 334.
7. FOG OR HAZE AND SMOKE.—The night being foggy, or hazy, or both, it was the duty of the steamer to moderate her speed, and blow her whistle. *Id.*
8. INEXCUSABLE NEGLIGENCE.—If the schooner was seen from the steamer at a distance of a mile and a half, the negligence on the steamer in not keeping out of the way was inexcusable. *Id.*
9. FOG.—In the condition of the atmosphere in this case, there was no fault in the schooner in not discovering the steamer at an earlier period of time. *Id.*
10. NO FAULT IN SCHOONER.—Under the circumstances in this case, it was not a fault in the schooner, to put her helm hard-a-port at the time she did, nor was she in fault in other respects. *Id.*

11. CHARTER-PARTY—DETENTION—LIABILITY OF CHARTERER.—Where the voyage described in the charter-party was a voyage "to San Francisco, or as near thereto as the vessel can safely get," and the cargo was to be delivered "alongside of any craft, steamer, floating depot, wharf, or pier, as may be directed by the consignees," and the consignees named a wharf to which, by reason of its crowded state, the vessel could not enter for a time greater than that within which, by other provisions in the charter-party, the discharge was to be effected after it had been commenced: *Held*, that the charterer was liable for the detention. *Williams* v. *Theobald*, 445.

ALASKA.

1. SPIRITS AND WINE—INTRODUCTION OF, INTO ALASKA.—By the act of March 3, 1873 (17 Stat. 530), the introduction of spirituous liquors and wine into Alaska is absolutely prohibited, subject to the power of the war department to permit such introduction for the use of the army therein; and, *semble*, that section 2 of the Alaska act of June 27, 1868 (15 Stat. 240; sec. 1954 R. S.), which gave the president "power to restrict and regulate or to prohibit the importation and use of * * * distilled spirits" into Alaska, is still so far in force, notwithstanding the passage of said act of March 3, 1873, as to authorize him to permit the introduction of said spirits, but not wine, as a regulation of the subject. *United States* v. *Stephens*, 117.

2. ATTEMPT TO INTRODUCE SPIRITUOUS LIQUORS INTO ALASKA.—By section 20 of the act of June 30, 1834 (4 Stat. 729), extended over Alaska by the act of March 3, 1873, *supra*, it was made a crime to attempt to introduce spirituous liquors or wine into Alaska: *Held*, that a person resident in Alaska, who ordered one hundred gallons of whiskey to be shipped to him at Alaska, by a wholesale dealer in San Francisco who had the whiskey on hand and for sale, with intent to introduce the same into Alaska, was not guilty of such attempt, because he had done no act to accomplish his illegal intent of which the law will take cognizance—the offer to purchase the liquor, and even the purchase itself, being acts preparatory and indifferent in their character. *Id.*

3. SAME.—*Semble*, that a criminal attempt to introduce liquor into Alaska cannot be committed unless the act done in pursuance of the illegal intent is performed after the liquor is brought so near some point or place of "the mainland, islands, or waters" of the district as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned. *Id.*

ASSESSMENT.

See GARNISHMENT, 1; MINING CORPORATION, 3.

BROKER.

1. SALE OF REAL PROPERTY BY A BROKER.—A contract to sell real property for a commission is performed when the broker procures a person who is able to pay for the same, to enter into a valid contract to purchase upon the terms proposed, or when he induces such person to offer to pay for the property and take a conveyance thereof upon being allowed a reasonable

time to examine the title thereto, which offer is refused by the owner, on the ground that the time allowed the broker within which to effect the sale is about to expire. *Watson* v. *Brooks*, 316.

BURDEN OF PROOF.

1. CUSTOM DUTIES—SMUGGLING—CONDEMNATION OF PROPERTY SEIZED.—Where a quantity of opium was seized by officers, the burden of proof is on the claimant to show that the property seized was of domestic manufacture, and not liable for custom duties; and if he fails to explain the difficulties of the case by the production of proofs within his power to produce, "condemnation follows from the defects of testimony on the part of such claimant." And where the claimant has it in his power to produce the best and most satisfactory evidence to repel the presumption which the law has raised against him, and he omits to do so, and contents himself with the weaker evidence, the presumption is "turned against him that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defence." *United States* v. *Opium*, 129.

CANDIDATES FOR OFFICE—PLEDGES.

1. DISQUALIFICATION BY REASON OF PLEDGES OF CANDIDATES FOR OFFICE.—Assuming that the citizens of San Francisco are authorized, through their representatives, constituting the board of supervisors, to lawfully fix the price of the water furnished by The Spring Valley Water Works to, and purchased by, the city and its inhabitants, the fact that candidates for the office of supervisors pledged themselves to the people, in accordance with the requirements of the resolutions of the public meeting nominating them before the election, does not disqualify the supervisors elected upon such pledges from acting in fixing the price of water. *Spring Valley Water Works* v. *Bartlett*, 555.

CERTIFICATE OF DEPOSIT.

1. DAMAGES FOR THE DETENTION OF CERTIFICATE OF DEPOSIT.—The defendants unlawfully detained a certificate of deposit of the value of two thousand dollars from the plaintiff: *Held*, that the plaintiff was entitled to recover damages for such detention equal to legal interest on the value of the certificate from the date of the demand therefor and refusal, to the recovery—and this without any evidence that the plaintiff would have converted said certificate into money and put it to use, other than his right to do so and the defendants' illegal prevention of the exercise of such right. *Sleppy* v. *Bank of Commerce*, 17.

CHINESE.

1. SPACE APPROPRIATED TO PASSENGERS.—A space upon a vessel bringing passengers into the United States under the act of March 3, 1855 (10 Stat. 715, sec. 4252, R. S.), is not "appropriated" to their use within the meaning of the term or the object and policy of the statute, unless it is given up to their *exclusive* use; and, therefore, the dining saloon of a steamship carrying Chinese passengers from Hongkong to Portland,

Oregon, in which such passengers were allowed to go and come during the day, but to which no number of them were allotted or assigned, and in which they neither ate nor slept, was not a space appropriated to their use. *United States* v. *Nicholson*, 162.

2. TOUCHING AT A PORT OF THE UNITED STATES.—A vessel touches at a port of the United States within the meaning of section 3 of the act of May 6, 1882 (Ses. L. 1881–2, p. 59), to exclude Chinese laborers from the United States, when she calls there for orders or a cargo for a foreign port, and Chinese laborers who are on board of her as passengers or crew are not unlawfully in the country contrary to said act, during her stay for such purpose. *In re George Moncan*, 350.

3. CHINESE CREWS.—The act aforesaid does not apply to Chinese who enter a port of the United States as seamen or members of the crew of a vessel arriving from a foreign port, with the intention of returning or proceeding to another foreign port in the ordinary course of commerce and navigation; but if such Chinese leave the vessel while in the American port and do not depart with her, their presence in the country becomes unlawful. *Id.*

4. THE DECK OF AN AMERICAN VESSEL IS AMERICAN TERRITORY.—A person on board of a vessel of the United States or any one of them, is in contemplation of law within the territory and jurisdiction of the United States, and therefore a Chinese laborer who shipped on an American vessel at London prior to the passage of the act aforesaid, and continued on her until her arrival in the United States, although after the expiration of the ninety days next following the passage of said act, is entitled to reside therein. *Id.*

5. CERTAIN CHINESE NOT LIABLE TO PERFORM LABOR ON HIGHWAYS.—Certain Chinese laborers came to this state to engage in labor upon public works, and on April 1, 1882, were in road district No. 8, in Multnomah county, at work on the construction of a railway from Portland to The Dalles and eastward, where they remained a few months, passing through and beyond the district as the road bed was completed, without any purpose or occasion to remain longer in the district or ever return there: *Held*, that they were not "residing" in said district on or before April 15th, within the meaning of the statute, so as to be liable to perform road labor therein. *On Yuen Hai Co.* v. *Ross*, 384.

6. LABORER.—The term "laborer" is used in the treaty with China of November 17, 1880, and the act in aid thereof of May 6, 1882, in its popular sense, and does not include any person but those whose occupation involves physical toil, and who work for wages, or with a view of disposing of the product or result of their labor to others. *Re Ho King*, 439.

7. ACTOR.—A Chinese actor or theatrical performer is not a "laborer" within the purview of said treaty or law; and is, therefore, entitled to come to and reside in the United States at pleasure. *Id.*

8. SECTION 6 OF THE ACT OF 1882.—The certificate provided for in section 6 of the act of May 6, 1882, is not the only competent evidence that a Chinese person is not a laborer, and, therefore, entitled to come to and reside within the United States, but the fact may be shown by any other pertinent and convincing testimony. *Id.*

COLLISION.

See ADMIRALTY.

COMMERCE, REGULATION OF.

1. CONSTITUTIONAL LAW—REGULATION OF COMMERCE.—Section 2955 of the political code of California, so far as it requires the payment of seventy cents for each passenger, inspected to ascertain if he is afflicted with leprosy, coming into the United States by sea, and imposing a fine for non-payment upon the owners and consignees of the vessel bringing them passengers, is unconstitutional and void. *People* v. *Pacific Mail Steamship Co.*, 640.

CONSTITUTIONAL LAW.

1. AMENDMENT OF STATUTE.—*Semble*, that section 1 of the act of December 20, 1865 (Ses. L., p. 33; Or. L., p. 707, sec. 12), giving half pilotage for a tender of pilot service to a vessel navigating the Columbia or Wallamet rivers above Astoria, was passed in contravention of section 22 of article IV of the constitution of the state, and is therefore void; but if considered valid, then section 1 of the act of October 25, 1870 (Ses. L., p. 51; Or. L., p. 710, sec. 27), declaring that such vessel, when "towed by a tug or steamer," should not be required "to take a pilot or pay half pilotage," is also valid, and therefore a pilot is not entitled to recover half pilotage for a tender and refusal of such pilot service. *The Glaramara*, 22.
2. DONEE UNDER SECTION 8 OF THE DONATION ACT.—J. R. took an undivided one fifth of the land occupied by her deceased father, under section 8 of the donation act (9 Stat. 497), and married H. in March, 1859: *Held*, that she took such interest directly from the U. S. as her general property, but that after February 14, 1859, under the operation of section 5 of Article XV of the constitution of the state, it became her separate property, and not subject to the marital rights of her husband. *Stubblefield* v. *Menzies*, 41.
3. THE FOURTEENTH AMENDMENT OF THE CONSTITUTION, in declaring that no State shall deny to any person within its jurisdiction the "equal protection of the laws," imposes a limitation upon the exercise of all the powers of the State, which can touch the individual or his property, including among them that of taxation. *San Mateo County* v. *S. P. R. R. Co.*, 238.
4. THE "EQUAL PROTECTION OF THE LAWS" to any one implies not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation. *Id.*
5. UNIFORMITY IN TAXATION requires uniformity in the mode of assessment as well as in the rate of percentage charged. *Id.*
6. TAXATION OF MORTGAGES—PUBLIC CORPORATIONS AND NATURAL PERSONS.—By the thirteenth article of the Constitution of California, "a

mortgage, deed of trust, contract, or other obligation by which a debt is secured, is treated, for the purposes of assessment and taxation, as an interest in the property affected thereby," and, "except as to railroad and other *quasi* public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. (Sec. 4.) . But by the same article "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county," are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein, no deduction from this value being allowed for any mortgages on the property: *Held*, That in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations as the basis of taxation, there is a departure from the rule of equality and uniformity. *Id.*

7. PRIVATE CORPORATIONS ARE PERSONS, within the meaning of the first section of the Fourteenth Amendment, and are entitled, so far as their property is concerned, to the equal protection of the laws. *Id.*

8. NOTICE—DUE PROCESS OF LAW.—Neither the Constitution nor the laws of California relating to the assessment of railroads operated in more than one county provide for notice to the owner, or an opportunity for him to be heard at any stage of the proceeding. In this respect both conflict with the guaranty that no one shall be deprived of his property without due process of law. *Id.*

9. SAME—NOTICE ESSENTIAL.—Whatever the character of the proceeding, by which one is deprived of his property, whether judicial or administrative; and whether it takes the property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. *Id.*

10. THE PROVISIONS OF ARTICLE XIII OF THE CONSTITUTION OF CALIFORNIA, treating of revenue and taxation, are not conditions upon the continued existence of railroad corporations. *Id.*

11. POWER OF STATE OVER CORPORATIONS.—The State possesses no power to withdraw corporations from the guaranties of the Federal Constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation. *Id.*

12. SAME.—Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the State cannot exercise any control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested. *Id.*

13. JOURNALS OF LEGISLATURE, COURT WILL NOTICE.—The Constitution of California (Sec. 15, Art. IV) provides that "on the final passage of all bills they shall be read at length and the votes shall be by yeas and nays upon each bill separately, and shall be entered on the journal, and no

bill shall become a law without the concurrence of a majority of the members elected to each house." Under this provision the Court, to inform itself, will look to the journals of the Legislature, and if it appear therefrom that the bill did not pass by the constitutional majority, then it will not be regarded as a law. *Id.*

14. STATUTE NOT PASSED.—The journals of the Legislature show that the Act of March 14, 1881, mentioned in the opinion, never became a law. *Id.*

15. RAILROAD ASSESSMENT UNCONSTITUTIONAL.—An assessment made in strict accordance with the provisions of the constitution of the state of California relating to the assessment of the property of "railroad and other *quasi* public corporations," violates the provisions of the fourteenth amendment to the constitution of the United States by taking private property without due process of law. *S. F. & N. P. R. R. Co.* v. *Dinwiddie*, 312.

16. VOLUNTARY PAYMENT.—Such assessment is void. A payment under it is not a payment under duress, but is voluntary, and cannot be recovered. *Id.*

17. LEGISLATURE—POWER OF, TO LEGALIZE ACTS OF COUNTY COURT.—The legislature may legalize the act of a county court in establishing a road without a legal petition, but not without notice to the person concerned. *Burns* v. *Multnomah Railway Co.*, 543.

18. TAKING PRIVATE PROPERTY FOR PUBLIC USES.—The legislature being prohibited (Or. Con., Art. I, sec. 18), from taking private property for public use, without just compensation therefor, it is necessarily implied thereby that the owner of the property so taken, shall have notice of the proceeding for appropriation, and an opportunity to be heard thereon. *Id.*

19. FOURTEENTH AMENDMENT—DUE PROCESS OF LAW.—Under the fourteenth amendment a state cannot appropriate private property for any purpose without due process of law, which includes notice of the proceeding and a prescribed opportunity to be heard upon the question involved. *Id.*

20. GRANT OF THE USE OF A STREET TO A RAILWAY COMPANY.—A grant by a county court, under section 26 of the corporation act (Or. Laws, 530), of the use of a street to a railway corporation for the purpose of constructing and operating a railway thereon, is a grant of a franchise, and the order or agreement making the same must be construed most strongly against the corporation and in favor of the public, so that nothing shall pass thereby but what clearly appears to have been intended. *Id.*

21. UNCONSTITUTIONAL ORDINANCE.—An ordinance which appears upon its face to violate the fourteenth amendment to the constitution of the United States, is void, and it can cast no legal cloud upon the rights of the parties, apparently, affected by it. All parties are, legally, presumed to know its invalidity. *Spring Valley Water Works* v. *Bartlett*, 555.

22. IMPAIRING OBLIGATION OF CONTRACT.—The corporation, known as The Spring Valley Water Works, was organized under the statute of 1858, which provided that the price of the water furnished to San Francisco and its citizens, should be fixed, annually, by two persons appointed by the city, two by the corporation, and one to be chosen by the other four; and in case the four cannot agree, the other to be appointed by the sheriff of the county. The fourteenth article of the constitution of California,

afterwards adopted, changed this mode without the consent of the corporation, and, provided, that the price of the water should be fixed, annually, by the board of supervisors of the city and county, alone—giving the corporation no voice in the matter. *Held:* Upon the authority of the *Elevator* and *Granger Cases* in the supreme court of the United States, that said article of the state constitution is not void, as taking private property for public or private use without compensation; or without due process of law; or as conferring the sole power to fix the rates upon the purchaser. 2. That under the decision in the *Sinking Fund Cases*, it does not impair the obligation of a contract, within the meaning of the several provisions of the constitution of the United States relating to those subjects. *Id.*

23. CONSTITUTIONAL LAW—REGULATION OF COMMERCE.—Section 2955 of the political code of California, so far as it requires the payment of seventy cents for each passenger, inspected to ascertain if he is afflicted with leprosy, coming into the United States by sea, and imposing a fine for non-payment upon the owners and consignees of the vessel bringing the passengers, is unconstitutional and void. *People* v. *Pacific Mail Steamship Co.*, 640.

CONTRACT.

1. CONTRACT FOR FUTURE PARTNERSHIP.—Where several parties agree to enter into partnership on a future day, but a part refuse to enter upon the business in pursuance of the terms agreed upon, and the partnership is never launched, whereby the others are injured, the only remedy is an action at law for the breach. *Goldsmith* v. *Sachs*, 110.
2. VOID FOR UNCERTAINTY.—Where the contract provides, that "the business of the partnership shall be buying, selling, and dealing in dry goods, and furnishing goods, and such other merchandise as may be convenient and profitable to all parties concerned," the description of the business is not so vague and indefinite as to render the contract void for uncertainty. *Id.*
3. PARTNERSHIP.—A contract between three persons to operate a "mining property as a company," creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of said enterprise; and this, notwithstanding the fact that such contract also provides that there shall be no division of profits between the parties until two of them are reimbursed therefrom the money expended in the purchase of two thirds of the property from the other one, and the cost of improving the same. *Bybee* v. *Hawkett*, 176.
4. PARTNERSHIP WITH A MEMBER OF ANOTHER PARTNERSHIP.—Although A may be interested with B in his interest in a partnership, consisting of B and two others, that does not make him a member of said last-mentioned partnership. *Id.*
5. INTEREST ON NOTE.—Where a note is made payable at a future day "with" interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect. *Tanner* v. *Dundee L. I. Co.*, 187.
6. SPECIFIC PERFORMANCE.—A contract to convey real property will be specifically enforced as prayed for by the plaintiff where its terms are

admitted by the defendant, and the only objection made to such performance is based upon a construction of the contract, as to the part to be performed by the plaintiff, which in the judgment of the court is unsupported by the language of the contract or the circumstances of the case. *Id.*

7. CERTAINTY.—A contract to issue a plain life insurance policy upon the life of the applicant for fifteen thousand dollars, payable to his wife, according to the form in use by the company, is sufficiently certain to be enforced; and if there is any extrinsic reason why it should not be enforced, as that it was procured by fraud or falsehood, it must be set up as a defence. *Hebert* v. *Mut. L. Ins. Co.*, 198.

8. SALE OF REAL PROPERTY BY A BROKER.—A contract to sell real property for a commission is performed when the broker procures a person who is able to pay for the same, to enter into a valid contract to purchase upon the terms proposed, or when he induces such person to offer to pay for the property and take a conveyance thereof upon being allowed a reasonable time to examine the title thereto, which offer is refused by the owner, on the ground that the time allowed the broker within which to effect the sale is about to expire. *Watson* v. *Brooks*, 316.

CONVEYANCES.

1. VOLUNTARY CONVEYANCE TO CHILDREN.—A was a surety on the official bond of M, and being liable thereon for defalcations of his principal, but without knowledge of the same, conveyed property to his children in consideration of their having remained at home and worked for him on the farm during their nonage, and in pursuance of a promise made by him to that effect, which conveyance left him without sufficient property to meet his existing liabilities under said bond: *Held*, That the services given to the father by the children were not a valuable consideration for the promise or the conveyances, as they only did what in law they were bound to do, and therefore the conveyances were voluntary—without a valuable consideration—and invalid as against the lien of a judgment subsequently obtained against A. on account of said defalcations, either by the obligee in the bond or a co-surety who had paid the full amount thereof. *Dowell* v. *Applegate*, 427.

2. IDEM—GRANDCHILD.—But a conveyance to a grandchild under like circumstances upon a promise to said child, and its father, to make the same, is not voluntary, but a conveyance for a valuable consideration, and therefore valid, as against such lien. *Id.*

3. ESCHEAT FUND.—The secretary of state, as such, is not authorized under the laws of Oregon, c. 16, p. 582, to collect escheat funds from the treasurer of state, and if he does so without authority from the party entitled thereto, or fails to account to him for the same, his sureties are not holden therefor. *Id.*

4. QUITCLAIM DEED—COVENANT THEREIN.—A quitclaim deed to a "piece or parcel of land," describing it, only operates as a conveyance to pass the grantor's present interest therein; but if such deed also contain a covenant warranting the "possession" of said land against any claim "by" or "through" the grantor, it will estop him and his heirs and subsequent grantees from maintaining any suit to effect such possession. *Traver* v. *Baker*, 535.

5. UNRECORDED DEED, WHEN VOID.—A conveyance made in 1861, and not recorded within thirty days from its execution, is void as against a subsequent conveyance, first recorded, to a purchaser in good faith and for a valuable consideration. *Id.*

See DOWER; FRAUDULENT CONVEYANCES.

CORPORATIONS.

1. STOCKHOLDER'S SUIT AGAINST CORPORATION.—A bill in equity by a stockholder against a corporation and its officers for relief, which the corporation itself should have sought, must not only state the grievances which entitle the stockholder to sue, but that he has exhausted all means within his reach to obtain redress within the corporation. *Dannmeyer* v. *Coleman*, 51.

2. SAME.—The stockholder must make an earnest, not a simulated effort, with the managing body of the corporation to induce remedial action on its part, before he will be heard in his own behalf. *Id.*

3. SAME.—If he fails with the directors of the corporation, and time permits, he must show in his bill that he has made an honest effort to obtain action by the stockholders as a body. *Id.*

4. PERSONAL EFFORTS.—He must himself have made an effort to secure a redress of grievances through the corporation. The efforts of some other stockholder several years before will not suffice. *Id.*

5. STOCKHOLDER AT TIME OF TRANSACTION.—He must have been a stockholder at the time of the transactions of which he complains, or his shares must have since devolved on him by operation of law. *Id.*

6. POWER OF STATE OVER CORPORATIONS.—The State possesses no power to withdraw corporations from the guaranties of the Federal Constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation. *San Mateo County* v. *S. P. R. R. Co.*, 238.

7. SAME.—Under the reserved power to amend, alter, or repeal the laws under which private corporations are formed, the State cannot exercise any control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business. It cannot divest property or rights which have become vested. *Id.*

8. ACT OF INCORPORATION—CHANGE OF CORPORATE NAME.—By an act of the legislature of Colorado, of February 5, 1866, certain persons were incorporated as the "Holladay Overland Mail and Express Company," with the privilege and power of changing its name by an "order" of its directors, "approved" by the stockholders; the bill alleges that the stockholders, in pursuance of said act, duly changed the name of the corporation to "Wells, Fargo & Co.," which change was afterwards approved by the legislature by the act of January 26, 1872. *Held*, 1. That until the contrary appears, it should be presumed that the final action of the stockholders was had in pursuance of the order of the directors; 2. That the essential act in the proceeding was the vote of the stockholders, to which the order of the board was only preliminary, and, therefore, that portion of the act providing for such order ought to be considered merely directory; and, 3. *Semble*, That the act of 1872, approving the change, is

not in conflict with section 1889 of the revised statutes, forbidding the legislature of Colorado from granting "private charters or especial privileges." *Wells, Fargo & Co.* v. *O. & C. R. Co.*, 600.

9. EXPRESS FACILITIES.—This term is probably a sufficient description of the accommodation or service which a railway or other transportation company is expected, and may be required to furnish, a person or corporation engaged in the express business. *Id.*
10. EXPRESS BUSINESS.—This business has come to be a recognized branch of the carrying trade, of which the court will take notice; and a railway or other corporation created by the state to serve the public as a common carrier, is bound to furnish the usual and proper facilities to persons engaged in such business, who are so far the agents, bailees, and representatives of the public. *Id.*
11. DECISIONS OF THE UNITED STATES CIRCUIT COURTS.—The circuit courts of the United States are co-ordinate tribunals, constituting a single system, and the decision of one of them, deliberately made, ought usually to be regarded as decisive of the question involved, until otherwise determined by the supreme court. *Id.*
12. COMPENSATION OF A RAILWAY CORPORATION.—Section 36 of the incorporation act (Or. Laws, 532), which declares a railway corporation formed thereunder to be a common carrier, and empowers it "to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe," authorizes such corporation to take reasonable tolls, not inconsistent with its character and obligation as a common carrier, and no more; and, so far, it constitutes a contract between the corporation and the state, the obligation of which the latter cannot impair, nor any court disregard. *Id.*
13. REASONABLE COMPENSATION.—What is reasonable compensation under said section 36, when the parties cannot agree thereabout, is a question to be determined by the court; but in allowing a provisional injunction, requiring a railway corporation to furnish an express company with the facilities theretofore enjoyed by it, over and upon its road, the court will assume that the compensation paid for such past facilities is reasonable, and require them to be furnished under the injunction at the same rates. *Id.*

See MINING CORPORATIONS.

COUNTY ROAD.

1. COUNTY ROAD—JURISDICTION TO ESTABLISH.—The county court has no jurisdiction of an application to establish a county road, except upon the petition of twelve householders of the vicinage, and notice to the persons concerned, as prescribed in sections 2 and 3 of the road law. (Or. Laws, 721.) *Burns* v. *Multnomah R. Co.*, 543.
2. IDEM—ORDER ESTABLISHING.—An order establishing a county road must direct the survey thereof to be recorded; and where the order provided that the survey should be recorded when the petitioners gave a bond to open a portion of the proposed road, which was never done, and the record never made, the road was not established. *Id.*
3. LEGISLATURE—POWER OF, TO LEGALIZE ACTS OF COUNTY COURT.—The legislature may legalize the act of a county court in establishing a road without a legal petition, but not without notice to the persons concerned. *Id.*

4. TAKING PRIVATE PROPERTY FOR PUBLIC USES.—The legislature being prohibited (Or. Con., Art. I, sec. 18), from taking private property for public use, without just compensation therefor, it is necessarily implied thereby that the owner of the property so taken, shall have notice of the proceeding for appropriation, and an opportunity to be heard thereon. *Id.*

5. FOURTEENTH AMENDMENT—DUE PROCESS OF LAW.—Under the fourteenth amendment a state cannot appropriate private property for any purpose without due process of law, which includes notice of the proceeding and a prescribed opportunity to be heard upon the question involved. *Id.*

6. GRANT OF THE USE OF A STREET TO A RAILWAY COMPANY.—A grant by a county court, under section 26 of the corporation act (Or. Laws, 530), of the use of a street to a railway corporation for the purpose of constructing and operating a railway thereon, is a grant of a franchise, and the order or agreement making the same must be construed most strongly against the corporation and in favor of the public, so that nothing shall pass thereby but what clearly appears to have been intended. *Id.*

7. IDEM—CASE IN JUDGMENT.—Where the agreement authorized a corporation, proposing to construct a railway from Albina to Vancouver, to lay ts track through the former place upon certain streets therein—"beginning at the ferry-landing at the foot of Mitchel street"—and it appearng that said ferry landing and Mitchel street were different and not contiguous places: *Held*, That the ambiguity must be resolved against the corporation, and the agreement construed as if it read simply, "at the foot of Mitchel street." *Id.*

8. APPROPRIATION OF STREET OR HIGHWAY BY RAILWAY.—A railway corporation cannot be authorized under section 26 of the corporation act aforesaid, to appropriate a public street or road to its use, unless such road or street has been legally established, according to some mode prescribed by statute. *Id.*

CRIMES AND CRIMINAL PROCEEDINGS.

1. ATTEMPT TO INTRODUCE SPIRITUOUS LIQUORS INTO ALASKA.—By section 20 of the act of June 30, 1834 (4 Stat. 729), extended over Alaska by the act of March 3, 1873, it was made a crime to attempt to introduce spirituous liquors or wine into Alaska: *Held*, that a person resident in Alaska, who ordered one hundred gallons of whiskey to be shipped to him at Alaska, by a wholesale dealer in San Francisco who had the whiskey on hand and for sale, with intent to introduce the same into Alaska, was not guilty of such attempt, because he had done no act to accomplish his illegal intent, of which the law will take cognizance—the offer to purchase the liquor, and even the purchase itself, being acts preparatory and indifferent in their character. *United States* v. *Stephens*, 116.

2. SAME.—*Semble*, that a criminal attempt to introduce liquor into Alaska can not be committed unless the act done in pursuance of the illegal intent is performed after the liquor is brought so near some point or place of "the mainland, islands, or waters" of the district as to render it convenient to introduce it from there, or to make it manifest that such was the present purpose of the parties concerned. *Id.*

3. TAKING PASSENGERS ON BOARD.—Passengers who go on board a vessel openly and in the usual way are presumed to have been taken on board

by the master within the purview of sections 4252–4253 of the revised statutes. *United States* v. *Thomson*, 122.

4. INTENT TO COMMIT CRIME.—Neglect in the discharge of a duty or indifference to consequences is in many cases equivalent to a specific criminal intent. *Id.*

5. CASE IN JUDGMENT.—The defendant being the master of a vessel under charter at the port of Hongkong to carry passengers to Portland, Oregon, permitted the charterers to load her under the inspection of the port officers without himself knowing or taking any steps to know how many passengers were on board; and upon arrival in Oregon it was found that there were one hundred and sixty passengers in excess of the number allowed to be carried by sections 4252–4253 of the revised statutes. *Held*, that it was the duty of the defendant to have taken steps before leaving the port to ascertain how many passengers he had on board, and that the omission of this duty was such negligence on his part as made him guilty of a violation of the statute. *Id.*

6. WRITING.—A sealed letter deposited in the mail addressed to some one is not a writing or publication within the purview of the first clause of section 3893 of the revised statutes, declaring obscene, etc., books, writings, etc., or "other publication of an indecent character," non-mailable. *United States* v. *Loftis*, 194.

7. LETTER.—A sealed letter is not within the prohibition of said section 3893, however indecent or obscene in its contents; but if there is any such delineation or language put upon the envelope containing it, it thereby becomes non-mailable, and the person depositing it in the mail thereby commits a crime. *Id.*

8. FUGITIVES FROM JUSTICE—EXTRADITION TREATY CONSTRUED.—An extradited fugitive cannot under the treaty of 1842 between the United States and Great Britain be held to answer for an offence for which his surrender could not have been asked and would not have been granted. *United States* v. *Watts*, 370.

9. AFFIDAVIT USED UNDER TIMBER CULTURE ACT.—By virtue of section 5 of the crimes act of March 3, 1857 (11 Stat. 250), and section 6 of the timber culture act of June 14, 1878 (20 Stat. 130), an affidavit taken before a county clerk of this state, may be used before the register and receiver, in any proceeding or question arising under said last named act in which an affidavit is allowed or authorized by any law of the United States or regulation of the land department thereof; and if such affidavit is willfully and knowingly or corruptly false in any material matter, an indictment for perjury may be maintained thereon in the proper United States court. *United States* v. *Shinn*, 403.

10. PERJURY.—Swearing to a false statement is not perjury unless the matter is material to the issue, question, or purpose about or for which the statement is made, or unless it is intended and calculated to give probability to a material statement or credibility to the affiant. *Id.*

11. TIMBER CULTURE ACT—COMPLIANCE WITH.—A person entering a quarter section of public land under the timber culture act, must break not less than five acres thereof within a year after his application therefor, and cultivate the same in some annual crop the next year, or it will be deemed abandoned; and planting the five acres in timber or cuttings, is not such cultivation. *Id.*

12. INDIAN COUNTRY—UMATILLA AGENCY.—Since the repeal of section 1 of the Indian intercourse act of 1834, (4 stat. 129), by section 5596 of the R. S., the only Indian country in the United States within the purview of that phrase, as used in chapter 4, title 28, of the R. S., are the tracts of land set apart by the authority of the United States, for the exclusive use and occupancy of particular Indian tribes, and known as Indian reservations: and the Umatilla reservation in Oregon is such Indian country. *United States* v. *Martin*, 473.

13. CRIMES COMMITTED BY OR AGAINST AN INDIAN.—In the exercise of its constitutional power to regulate intercourse with the Indian tribes, congress may define and punish crimes committed by white men upon the person or property of an Indian, and *vice versa* within as well as without the limits of a state. *Id.*

14. MURDER ON THE UMATILLA RESERVATION.—Congress having provided for the punishment of murder committed in the Indian country (sections 2145, 5329, R. S.), the United States circuit court for the district of Oregon has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man; and therefore it is a violation of section 5,398 of the R. S., for any one to resist or obstruct the execution of an order made by a circuit court commissioner, engaged in the examination of an Indian charged before him with the commission of murder, under such circumstances. *Id.*

CUSTOMS.

See DUTIES.

DAMAGES.

1. DAMAGES FOR THE DETENTION OF CERTIFICATE OF DEPOSIT.—The defendants unlawfully detained a certificate of deposit of the value of two thousand dollars from the plaintiff: *Held*, that the plaintiff was entitled to recover damages for such detention equal to legal interest on the value of the certificate from the date of the demand therefor and refusal, to the recovery—and this without any evidence that the plaintiff would have converted said certificate into money and put it to use, other than his right to do so and the defendants' illegal prevention of the exercise of such right. *Sleppy* v. *Bank of Commerce*, 17.

2. DAMAGES.—Where the complaint presents a case for some damages, even, if only nominal, it is not necessary, on demurrer, to determine the rule of damages. *Goldsmith* v. *Sachs*, 110.

3. DAMAGES.—Damages as well as profits may now be recovered in a suit in equity, for an infringement of a patent but not a copyright. *Chapman* v. *Ferry*, 191.

4. COLLISION.—Damages decreed against a vessel overtaking another vessel for not keeping out of her way. *Simpson* v. *Spreckels*, 229.

5. EXEMPLARY DAMAGES.—In vindictive actions, such as assault and battery, slander, libel, seduction, etc., where fraud, malice, cruelty, oppression, brutality, or wantonness is shown, on the part of the defendant, exemplary damages may be recovered. *Brown* v. *Evans*, 488.

6. WEALTH OF DEFENDANT.—In the above class of actions evidence may be given of defendant's wealth. *Id.*

7. CRIMINAL LIABILITY OF DEFENDANT.—Exemplary damages may be recovered in a civil action, although the act complained of may be a crime, or misdemeanor, and subject the defendant to criminal prosecution therefor. *Id.*

8. GOOD CHARACTER.—In actions for damages for assault and battery, evidence of defendant's former good character is not admissible. *Id.*

9. NEW TRIAL—CUMULATIVE EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence, when such evidence is merely cumulative, or is upon unimportant matters in the case, or where, in the opinion of the court, such evidence, if produced, would not affect the action or verdict of a jury. *Id.*

10. EXCESSIVE DAMAGES.—A new trial will not be granted on the ground of excessive damages, in an action of personal tort, unless it appear that the jury were influenced by passion, prejudice, corruption, or willful disregard of law, in assessing such damages. *Id.*

11. GENERAL RULE OF DAMAGES.—The general rule is, that no damages can be recovered until they shall have actually accrued; and that an action can not be maintained on a mere liability to a third party to which a plaintiff has been subjected by the act of the defendant. The plaintiff, in such a case, must allege and prove, that he has incurred actual damage by showing the payment, or other satisfaction of such liability. *California Dry Dock Co.* v. *Armstrong*, 523.

DEMURRER.

See PENALTIES AND FORFEITURES; WASTE, 2.

DONATION ACT.

1. DONEE UNDER SECTION 8 OF THE DONATION ACT.—J. R. took an undivided one fifth of the land occupied by her deceased father, under section 8 of the donation act (9 Stat. 497), and married H. in March, 1859: *Held*, that she took such interest directly from the U. S. as her general property, but that after February 14, 1859, under the operation of section 5 of Article XV of the constitution of the state, it became her separate property, and not subject to the marital rights of her husband. *Stubblefield* v. *Menzies*, 41.

2. LIMITATION—LIFE ESTATE AND REMAINDER.—When the husband has a life estate in the lands of the wife and she the remainder, the statute of limitations runs against him in respect to such life estate, but not against the wife in respect to the remainder, during the continuance of such life estate; and when such life estate is lost by an adverse possession sufficient to bar an action by the husband for the recovery thereof, a conveyance of the premises by the husband and wife only passes the wife's interest, the remainder, and therefore does not enable their grantee to maintain an action for the possession during the life of the husband. *Id.*

3. STATUTE OF LIMITATIONS—REPEAL BY IMPLICATION.—By the law of Oregon since May 1, 1854, an action to recover possession of real property was barred by an adverse possession of twenty years, and in case of a married woman the limitation did not include the period of coverture; and during the same time a married woman might bring an action to recover her separate property without joining her husband therein: on

October 17, 1878, an act was passed (Ses. L., p. 21), reducing this period to ten years, and providing that the same shall not be extended more than five years by reason of the disability of marriage; and at the same session of the assembly, an act was passed (Ses. L., p. 92), on October 21st, concerning the rights and liabilities of married women, and the relation between husband and wife, "which provided (section 7) that a wife might prosecute and defend all actions at law or in equity, for the preservation and protection of her rights and property, as if unmarried:" *Held*, that the passage of the second act did not affect the first one, and that notwithstanding it, a married woman was entitled to five years in addition to the time allowed an unmarried one, within which to bring an action for the recovery of the possession of her real property. *Id.*

4. RESERVATION OF PUBLIC LANDS IN OREGON.—By the passage of the donation act of September 27, 1850 (9 Stat. 497), and the amendment thereto of February 14, 1853 (10 Stat. 158), congress disposed of all the public lands in Oregon to persons who were or should become settlers thereon and otherwise comply with the provisions of such act, except, among others, such portions thereof as might be designated by the authority of the president for certain military purposes and "other needful public uses," not exceeding six hundred and forty acres at any one point or place for a fort, nor more than twenty acres for any other purpose. *Held*, 1. That while an order issued by the secretary of war designating a reservation under this act for a military post or station may be presumed to have been made by the authority of the president, until the contrary appears, no such presumption arises in case such order is made by any one else, and therefore an order issued by the military officer in command of the department directing the establishment of "a military reservation" at Port Orford, Oregon, is void and of no effect; 2. That a valid designation of a reservation for military or light-house purposes must indicate or describe with reasonable certainty in some public document or record the quantity, limits, and location of such reservation; and the same ought to be noted, as soon as practicable, on the plat of the survey of the township; and 3. That such a reservation, if designated, so as to substantially exceed the quantity allowed by law, is illegal and void. *United States* v. *Tichenor*, 142, and *United States* v. *McGraw*, 156.

5. PATENT ISSUED CONTRARY TO LAW.—When it appears on the face of a patent that it was issued contrary to law, it is void, and a court of law will so pronounce; but nevertheless the United States is entitled to maintain a suit in equity to have such void patent cancelled. *Id.*

6. POSSESSORY RIGHT OF MARRIED SETTLER.—A married settler under the donation act, prior to completion of his residence and cultivation, may abandon or dispose of his possessory right or location without the consent of his wife. *Id.*

7. LANDS—PURCHASE OF, FOR THE UNITED STATES.—A conveyance of lands to the United States is void and inoperative unless the purchase is authorized by congress. Section 3736 of the revised statutes. *Id.*

8. FORT—MEANING OF THE TERM.—The term "fort," as used in the donation act, implies a place of more permanence and strength than a mere frontier camp, post, or station. *Id.*

9. PORT ORFORD.—Congress never authorized or provided for the erection or maintenance of a "fort" at Port Orford. *Id.*
10. PROMISE MADE UNDER ILLEGAL ARREST.—The arrest and eviction of the defendant, William Tichenor, in 1864, from his donation claim, at Port Orford, or that portion of it said to have been a "military reservation," and his subsequent imprisonment by military force and without process of law, were illegal acts, and any promise extorted from him as a condition of his liberation, concerning his future claim to the premises, was and is void and of no effect; neither would a verbal promise of non-claim, however induced or made, be sufficient to affect his right to or interest in the premises. *Id.*
11. RESIDENCE AND CULTIVATION OF A "SETTLER."—A settler under the donation act is not required to reside "all over" his claim, nor to cultivate the whole of it, and therefore his proof of residence and cultivation is not false if he actually resided anywhere within the exterior lines of the claim and cultivated any portion of it. *Id.*
12. SALE OF PUBLIC LANDS.—A sale of public lands unauthorized by law is void, and the purchaser thereat acquires no right thereby, whether he knew or did not know of such want of authority. *Id.*
13. DONATION TO MARRIED PERSONS UNDER SECTION 5 OF THE DONATION ACT.—Upon the death of a married donee, intestate, under section 5 of the donation act (9 Stat. 497), after compliance with the act, and before the issue of a patent, the share of the deceased in the donation descends to his or her heirs, under the local law of descents (Or. Laws, 547), and is not affected by the provision in section 4 of said act, giving the share of a married donee, dying under like circumstances, to the survivor and children, or heirs of the deceased, in equal parts. *Proebstel* v. *Hogue*, 592.
14. DIVISION OF DONATION BETWEEN SETTLER AND WIFE.—The division of a donation to a married man under section 4 of the donation act of September 27, 1850 (9 Stat. 497), between the settler and his wife, is committed by the act to the discretion of the surveyor general, and in contemplation of law is made when the settler proves, to the satisfaction of said officer, that he has complied with the provisions of the act, and the latter issues the certificate containing the facts constituting such compliance, and specifying the portion of the donation set apart to the husband and that to the wife, as provided in section 7 of said act; and no valid objection thereto is found by the commissioner of the general land office, which is shown by the subsequent issue of a patent thereon. *Traver* v. *Tribou*, 511.
15. SUIT FOR PARTITION—STATUTE OF LIMITATIONS.—The wife of a married settler under section 4 of the Donation act, died after final proof by the settler of compliance with the act and before the issue of the patent: *Held*, 1. That the half of the donation to which she was or would have been entitled, was thereupon granted, by the act, to her surviving husband and children in equal parts as the direct donees of the United States; and, 2. The statute of limitations did not commence to run against the right of the heirs of said husband to maintain a suit against his vendees of certain distinct portions thereof, for a partition of their interests in said half of said donation, until the same was formally and finally divided by the surveyor general as aforesaid. *Id.*

DOWER.

1. PROMISE OF WIFE TO HUSBAND.—At common law a husband and wife cannot contract with one another, and therefore the *promise* of the wife to release her right of dower in certain property of the husband's is not a valuable consideration for a conveyance by him to her of other property. *Collinson* v. *Jackson*, 357.

DUTIES.

1. ACTION TO RECOVER DUTIES.—The plaintiff brought an action to recover the amount of duties paid by him on merchandise entered as sago flour, but classed and taxed by the collector as starch, against the protest of the plaintiff, that the article was sago flour and free of duty: *Held*, that the plaintiff must recover, if at all, upon the ground stated in his protest, and therefore he could not recover, although it appeared on the trial that the article was, in fact, not starch, and not dutiable. *Chung Yune* v. *Kelly*, 415.

2. FLOUR—STARCH.—A flour which is made from a farinaceous plant for food, though largely composed of starch granules, is not, therefore, the "made" or manufactured starch of commerce, upon which the statute (sec. 2504 R. S., p. 481) imposes a duty when brought from a foreign country; and it matters not that it may be in some measure used as starch. *Id.*

3. EXPRESS DESIGNATION OF AN ARTICLE.—The farina of the root of the plant of the genus Manihot, whether known as root flour, cassava, or tapioca, having been expressly exempted from duty by congress (sec. 2505 R. S., pp. 488, 489), is not included in the statute, *supra*, imposing a duty on starches, although it may be largely composed of starch granules and fit for use as starch. *Id.*

4. DUTIES—SHRINKAGE IN WEIGHT.—Where a cargo of coke, imported from Wales, by reason of evaporation of the moisture contained in it during the voyage, weighed several tons less than when shipped: *Held*, that duties could only be legally collected on the actual weight at the time of the importation, and not on the weight shown by the invoice. *Balfour* v. *Sullivan*, 648.

5. REGULATION OF THE SECRETARY OF THE TREASURY.—A regulation of the secretary of the treasury, that duties shall be collected according to the invoice, unless the importer accounts, by proofs for the discrepancy between the amount shown by the invoice and the actual weight at the time of importation, is no defense to an action to recover the duties exacted from the importer on the difference between the amount actually imported, and the amount shown by the invoice to have been shipped. *Id.*

EQUITY.

1. STOCKHOLDER'S SUIT AGAINST CORPORATION.—A bill in equity by a stockholder against a corporation and its officers for relief, which the corporation itself should have sought, must not only state the grievances which entitle the stockholder to sue, but that he has exhausted all means within his reach to obtain redress within the corporation. *Dannmeyer* v. *Coleman*, 51.

2. SAME.—The stockholder must make an earnest, not a simulated effort, with the managing body of the corporation to induce remedial action on its part, before he will be heard in his own behalf. *Id.*

3. SAME.—If he fails with the directors of the corporation, and time permits, he must show in his bill that he has made an honest effort to obtain action by the stockholders as a body. *Id.*

4. PERSONAL EFFORTS.—He must himself have made an effort to secure a redress of grievances through the corporation. The efforts of some other stockholder several years before will not suffice. *Id.*

5. STOCKHOLDER AT TIME OF TRANSACTION.—He must have been a stockholder at the time of the transactions of which he complains, or his shares must have since devolved on him by operation of law. *Id.*

6. THE STATUTE OF LIMITATIONS of California applies to both legal and equitable causes of action; and an action for relief on the ground of fraud is barred in three years, the cause of action not to be deemed to have accrued till the discovery by the aggrieved party of the facts constituting the fraud. *Id.*

7. DEMURRER.—Where it appears that the fraudulent acts constituting the cause of action were performed more than three years before the filing of the bill, a demurrer will be sustained, unless it also appears that the facts constituting the fraud were not discovered till within three years. *Id.*

8. KNOWLEDGE OF FRAUD.—The means of knowledge of fraud are equivalent to actual knowledge. *Id.*

9. JURISDICTION.—Where alienage is the jurisdictional fact, all the parties on one side of the controversy must be aliens, and all on the other side citizens. *Id.*

10. JURISDICTION IN STOCKHOLDER'S SUIT.—Whether, where an alien stockholder of a California corporation sues California corporations, and citizens of California in the United States courts, on behalf of himself and all other stockholders, it is not necessary to allege that he and all stockholders on whose behalf he sues are aliens, *quære?* *Id.*

11. SAME.—Whether, where an alien stockholder of a California corporation seeks an accounting in equity, between such California corporation and several other corporations and citizens of California, the United States courts have jurisdiction, *quære?* *Id.*

12. SEVERAL STOCKHOLDERS' SUITS.—Whether each owner of a share of stock can bring a suit on his own behalf, and on behalf of all other stockholders for the same grievances, *quære?* *Id.*

13. INDISPENSABLE PARTIES.—The owners of the land at the time of filing a bill in equity to vacate a patent of the United States, are indispensable parties to the bill; and when it is filed against the patentee alone, after he has conveyed the land and ceased to have any interest in it, the bill will be dismissed for want of necessary parties. *United States* v. *C. P. R. R. Co.*, 81.

14. ALLEGATION OF FRAUD.—It is not sufficient to allege in a bill to set aside the patent to a "settler" that it was "fraudulently" obtained, by means of "false proof," but the acts constituting the fraud should be substantially stated. *United States* v. *Tichenor*, 142, and *United States* v. *McGraw*, 156.

15. LAPSE OF TIME.—Mere lapse of time is a defence in equity in cases not within the operation of the statute of limitations. *Id.*

16. DISCOVERY.—A demurrer will lie to an allegation in a bill, the answer to which may subject the defendant to anything in the nature of a penalty or forfeiture—as an allegation concerning the number of copies sold and on hand of a pirated map. *Chapman* v. *Ferry*, 191.

17. PENALTIES AND FORFEITURES.—The penalties and forfeitures given by section 4965 of the revised statutes (17 Stat. 214), for an infringement of a copyright, cannot be enforced in a suit in equity; and a prayer in a bill, that the plate and unsold copies of a pirated map be delivered up to an officer of the court for cancellation and destruction is demurrable, as asking the enforcement of such forfeiture. *Id.*

18. DAMAGES.—Damages as well as profits may now be recovered in a suit in equity, for an infringement of a patent but not a copyright. *Id.*

19. EQUITY—SPECIFIC PERFORMANCE OF CONTRACT.—Equity has jurisdiction to enforce the performance of a contract to deliver a policy of insurance; and having taken jurisdiction for that purpose, will, in case there has been a loss or death, retain it for the purpose of decreeing payment of the policy. *Hebert* v. *Mutual Life Ins. Co.*, 198.

20. BILL OF REVIEW.—A bill of review is a proceeding in the nature of a writ of error, and it may be brought to modify or reverse a decree given in a suit in equity in favor of the United States for errors apparent upon the face thereof. *Bush* v. *United States*, 322.

21. IDEM—SERVICE OF SUBPŒNA IN.—Upon a bill of review to correct a decree given in favor of the United States the subpœna to appear and answer may be served on the district attorney. *Id.*

22. BILL BY JUDGMENT CREDITOR TO SET ASIDE CONVEYANCE.—The assignee of a promissory note brought an action against the maker, in this court, and had judgment therein, and then brought a suit to set aside a certain conveyance of the judgment debtor to his wife, as fraudulent: *Held*, that the wife was entitled to show as a defense to the suit that the judgment was void for want of jurisdiction in the court to pronounce it. *Collinson* v. *Jackson*, 357.

23. AMENDMENT.—An amendment allowed to the bill on the final hearing, stating the value of the matter in dispute to be over five hundred dollars. *Id.*

24. PARTNERS—INDISPENSABLE PARTIES.—Where a bill in equity is filed against one of the members of a copartnership, to set aside partnership tranactions, and vacate a conveyance of real estate, assets of the partnership, but held in the name of one of the partners for the benefit of the firm, and for an account, all the partners are indispensable parties to the bill. *Bell* v. *Donohoe*, 435.

25. INDISPENSABLE PARTIES TO STOCKHOLDERS' BILL.—A stockholder of a New York corporation filed a bill in equity on behalf of himself and such other stockholders of said corporation as should choose to come in, against a California corporation and other defendants, to set aside transactions between the said New York corporation and the other defendants; also other transactions dependent thereon, without making the corporation of which he is a stockholder a party to the bill: *Held*, That the New York corporation, of which complainant is a stockholder, is an indispensable party to the bill. *Id.*

26. REQUISITES OF STOCKHOLDERS' BILL.—Bill, also, held insufficient, as not containing the allegations essential to a stockholder's bill as established in *Hawes* v. *Oakland*, 104 U. S. 450; *Huntington* v. *Palmer*, Id. 482, and *Dannmeyer* v. *Coleman*, *ante*, 51. *Id.*

27. PROOF OF INFRINGEMENT BEFORE BILL FILED.—An infringement must be shown to have taken place either by making, selling, or using the article patented, before the filing of the bill, or there can be no recovery. *Slessinger* v. *Buckingham*, 469.

28. ANSWER TO BILL UNDER OATH.—Where the complainant does not waive an answer to the bill under oath, the answer, distinctly denying the material matters alleged, not only makes an issue, but proves it; so that it will require the evidence of two witnesses, or of one witness, and other circumstances equivalent to a second, to overthrow the answer. *Id.*

29. WAIVING ANSWER UNDER OATH.—The great advantage to complainant in many cases under the present rules relating to the competency of witnesses of waiving an answer under oath, pointed out. *Id.*

30. EXCEPTIONS FOR IMPERTINENCE.—Exceptions to a bill for impertinence will not be allowed, unless it is clear that the matter excepted to cannot be material to the plaintiff's case; and matters which may be so material are not necessarily impertinent, because they are such as the court may judicially take notice of; nor is it necessarily impertinent in a bill for an injunction to refer to recent adjudications of the question involved, in similar cases in other courts. *Wells, Fargo & Co.* v. *O. R. & N. Co.*, 600.

31. MULTIFARIOUSNESS—NUISANCE.—Several parties owning extensive mines at various points on the affluents of the Yuba River, work them independently of each other by the hydraulic process, discharging their waste earth and other *debris* into the stream whence it flows down into the main river, where the *debris* becomes mingled into one indistinguishable mass, passes on, and is deposited along the course of the river in the valley below, burying valuable lands and creating a public and private nuisance. A bill in equity by a party injured against all the parties thus contributing to the nuisance to enjoin it, is not demurrable as being multifarious, or for a misjoinder of parties, defendant. *Woodruff* v. *N. B. Gravel M. Co.*, 628.

32. SAME.—The parties thus creating the nuisance may be joined in equity both on the ground that they co-operate, in fact, and actually contribute to the nuisance, the injury being the single result of the action of the *debris* combined and operating together long before it reaches the place where the injury is effected. Also, on the ground of avoiding a multiplicity of suits. *Id.*

33. NUISANCES—PARTIES—TENANT IN COMMON.—One tenant in common of land injured by a public and private nuisance, may sue to enjoin the nuisance, without making his co-tenant a party, either as complainant, or defendant. *Id.*

See PENALTIES AND FORFEITURES.

ESCHEAT.

See CONVEYANCES, 3; FRAUD.

ESTOPPEL.

1. VOID CONTRACT—ESTOPPEL.—While the insurer may be estopped to insist on conditions and restrictions contained in a policy issued with a knowledge of facts inconsistent therewith, neither party to a contract of insurance which is void, as being contrary to public policy, is estopped to deny its legality. *Spare* v. *Home Mutual Ins. Co.*, 618.

EVIDENCE.

1. EX PARTE SURVEYS AS EVIDENCE.—*It seems* that an *ex parte* survey, made by direction of the commissioner of the land office, of the exterior boundaries of a rejected Spanish grant, many years after the rejection, and after the lands embraced in the supposed grant have been regularly officially surveyed and disposed of as public lands, is not admissible as evidence on the part of the government in a suit to vacate a patent. *United States* v. *C. P. R. R. Co.*, 81.

See NEGLIGENCE, 4, 5; PRACTICE, 3, 4.

EXECUTION.

See GARNISHMENT; PRACTICE, 9.

EXPRESS COMPANIES.

1. ACT OF INCORPORATION—CHANGE OF CORPORATE NAME.—By an act of the legislature of Colorado, of February 5, 1866, certain persons were incorporated as the "Holladay Overland Mail and Express Company," with the privilege and power of changing its name by an "order" of its directors, "approved" by the stockholders; the bill alleges that the stockholders, in pursuance of said act, duly changed the name of the corporation to "Wells, Fargo & Co.," which change was afterwards approved by the legislature by the act of January 26, 1872. *Held*, 1. That until the contrary appears, it should be presumed that the final action of the stockholders was had in pursuance of the order of the directors; 2. That the essential act in the proceeding was the vote of the stockholders, to which the order of the board was only preliminary, and, therefore, that portion of the act providing for such order ought to be considered merely directory; and, 3. *Semble*, That the act of 1872, approving the change, is not in conflict with section 1889 of the revised statutes, forbidding the legislature of Colorado from granting "private charters or especial privileges." *Wells, Fargo & Co.* v. *O. R. & N. Co.*, 601.

2. EXPRESS FACILITIES.—This term is probably a sufficient description of the accommodation or service which a railway or other transportation company is expected, and may be required to furnish, a person or corporation engaged in the express business. *Id.*

3. EXPRESS BUSINESS.—This business has come to be a recognized branch of the carrying trade, of which the court will take notice; and a railway or other corporation created by the state to serve the public as a common carrier, is bound to furnish the usual and proper facilities to persons engaged in such business, who are so far the agents, bailees, and representatives of the public. *Id.*

4. DECISIONS OF THE UNITED STATES CIRCUIT COURTS.—The circuit courts of the United States are co-ordinate tribunals, constituting a single system, and the decision of one of them, deliberately made, ought usually to be regarded as decisive of the question involved, until otherwise determined by the supreme court. *Id.*

5. COMPENSATION OF A RAILWAY CORPORATION.—Section 36 of the incorporation act (Or. Laws, 562), which declares a railway corporation formed thereunder to be a common carrier, and empowers it "to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe," authorizes such corporation to take reasonable tolls, not inconsistent with its character and obligation as a common carrier, and no more; and, so far, it constitutes a contract between the corporation and the state, the obligation of which the latter cannot impair, nor any court disregard. *Id.*

6. REASONABLE COMPENSATION.—What is reasonable compensation under said section 36, when the parties cannot agree thereabout, is a question to be determined by the court; but in allowing a provisional injunction, requiring a railway corporation to furnish an express company with the facilities theretofore enjoyed by it, over and upon its road, the court will assume that the compensation paid for such past facilities is reasonable, and require them to be furnished under the injunction at the same rates. *Id.*

EXTRADITION.

See FUGITIVES FROM JUSTICE.

FELLOW-SERVANT.

1. NEGLIGENCE OF FELLOW-SERVANT.—The employer is not liable to a servant for an injury resulting from the negligence of a fellow-servant in the same line, or department of employment; provided the employer exercises due care in the selection of competent servants. *Buckley* v. *G. & C. S. M. Co.*, 394.

2. WHO ARE FELLOW-SERVANTS.—The runner of a steam-engine employed in lowering men and material, and hoisting rock in sinking a shaft, is a fellow-servant in the same line, or department of service, within the rule, with the men in the shaft engaged in excavating the shaft and loading the rock to be hoisted. *Id.*

3. NO WARRANTY—ONLY DUE CARE REQUIRED.—The employer does not warrant the competency of his servants. He is only bound to exercise due care in the selection of careful and competent men for the service to be performed. *Id.*

4. EVIDENCE OF INCOMPETENCY.—The mere fact that an accident occurred, though evidence of negligence on that particular occasion, is not, by itself, sufficient evidence to authorize a jury to find that the party so negligent is not a careful and competent man for the service in which he was engaged. *Id.*

5. INSTRUCTION TO JURY IN ABSENCE OF EVIDENCE.—Upon the close of plaintiff's testimony, if the evidence is insufficient to justify a verdict for plaintiff, the Court will instruct the jury to find for the defendant. *Id.*

FORFEITURE.

See PENALTIES AND FORFEITURES.

FRAUD AND FRAUDULENT CONVEYANCE.

1. CONVEYANCE TO HINDER, ETC., CREDITORS, GOOD BETWEEN THE PARTIES.—A conveyance though made to hinder, delay, or defraud creditors, is valid as between the parties thereto, and is only so far voidable as to enable a creditor who is prejudiced by it, to enforce his demand against the grantor. *Collinson* v. *Jackson*, 357.

2. FRAUDULENT CONVEYANCE.—A voluntary conveyance of real property by a husband to his wife through the intervention of her father, which left him unable to pay his debts, or if made for a valuable consideration, as claimed, it being also made within the intent to hinder and delay creditors to the knowledge of the wife, held fraudulent. *Id.*

3. VOLUNTARY CONVEYANCE TO CHILDREN.—A was a surety on the official bond of M, and being liable thereon for defalcation of his principal, but without knowledge of the same, conveyed property to his children in consideration of their having remained at home and worked for him on the farm during their nonage, and in pursuance of a promise made by him to that effect, which conveyance left him without sufficient property to meet bis existing liabilities under said bond: *Held*, That the services given to the father by the children were not a valuable consideration for the promise or the conveyances, as they only did what in law they were bound to do, and therefore the conveyances were voluntary—without a valuable consideration—and invalid as against the lien of a judgment subsequently obtained against A on account of said defalcation, either by the obligee in the bond or a co-surety who had paid the full amount thereof. *Dowell* v. *Applegate*, 427.

4. IDEM—GRANDCHILD.—But a conveyance to a grandchild under like circumstances upon a promise to said child, and its father, to make the same, is not voluntary, but a conveyance for a valuable consideration, and therefore valid, as against such lien. *Id.*

5. ESCHEAT FUND.—The secretary of state, as such, is not authorized under the laws of Oregon, c. 16, p. 582, to collect escheat funds from the treasurer of state, and if he does so without authority from the party entitled thereto, or fails to account to him for the same, his sureties are not holden therefor. *Id.*

6. SEPARATE PROPERTY OF WIFE USED BY HUSBAND.—Where moneys of a married woman are habitually collected and used in his business by the husband for a series of years, and mixed with his property, without any account thereof being kept, thus giving him credit in his business, and there is no specific agreement with his wife for repayment, or, that the property purchased with it shall be hers, the moneys so used, and the goods or property so purchased, become his for the purpose of paying his debts. *Knowlton* v. *Mish*, 625.

7. A MORTGAGE BY THE HUSBAND TO SECURE MONEYS OF THE WIFE SO COLLECTED AND USED, kept from the record till after the purchase and receipt of a large amount of goods by the husband and his son, they being at the time largely insolvent, held to be fraudulent as to the parties selling the goods. *Id.*

8. FRAUD IS GENERALLY A QUESTION OF FACT, to be determined by all the circumstances of the case. *Id.*

9. WIFE'S SEPARATE PROPERTY.—A wife desiring to preserve her rights in her separate property, should take reasonable care to keep it distinct from her husband's business, so that it shall not become the means of practising fraud upon others. *Id.*

See DOWER.

FRAUDULENT AMENDMENT.

See CONSTITUTIONAL LAW.

FUGITIVES FROM JUSTICE.

1. FUGITIVES FROM JUSTICE—EXTRADITION TREATY CONSTRUED.—An extradited fugitive cannot, under the treaty of 1842 between the United States and Great Britain, be held to answer for an offence for which his surrender could not have been asked and would not have been granted. *United States* v. *Watts*, 370.

GARNISHMENT.

1. DEBT DUE BY STOCKHOLDER TO CORPORATION.—Judgment was obtained by the plaintiff against the defendant for nineteen thousand and two dollars and five cents, and an execution thereon as against the defendant returned *nulla bona* and served on F. B. Harrington as a debtor of the defendant for one hundred and sixty-eight dollars and fifty cents, on account of unpaid calls on assessments made upon said Harrington's shares in the capital stock of the defendant, to which Harrington answered he owed the defendant nothing; but the answer not proving satisfactory to the plaintiff, he procured an order under section 309 of the code requiring the former to appear before a referee for examination; whereupon the plaintiff served on him written allegations concerning said indebtedness as provided in section 162 of the code, to which the garnishee demurred that the court had no jurisdiction and that the garnishee is not liable in this proceeding: *Held*, 1. That the proceeding by garnishment under sections 150 and 161–9 of the code does not authorize a demurrer to the allegations of the plaintiff, but requires an answer thereto by the garnishee to which exceptions may be taken for insufficiency: 2. A due and unpaid call or assessment upon the shares of a stockholder in the capital stock of a corporation is a "debt" due such corporation within the purview of section 147 of the code, and may be collected from such stockholder by a judgment creditor of the corporation by garnishment, under sections 150 and 161–9 aforesaid. *Faull* v. *Alaska G. & S. M. Co.*, 420.

HIGHWAYS.

See CHINESE, 5.

HOMESTEAD.

1. HOMESTEAD ACT OF NEVADA CONSTRUED.—A party claiming the benefit of the homestead act, must record his written claim, or declaration of homestead, in the manner in the act prescribed. *Nevada Bank* v. *Treadway*, 456.
2. WHEN DECLARATION TAKES EFFECT.—When such declaration is duly made and recorded, the property, from that instant, becomes exempt from

forced sale, except for the debts and liabilities mentioned in the constitution and statute of the state. *Id.*

3. SAME.—Where declaration of homestead was duly made and recorded *five* days prior to advertised sale of premises: *Held*, that such declaration was made and recorded within time; that the premises could not be legally sold, and that a forced sale thereof was void, the debt upon which the homestead was sold not being one of the class of debts enumerated and excepted in the constitution of the state. *Id.*
4. DEDICATION—WHEN RIGHTS ATTACH.—Homestead rights attach whenever the property is dedicated to such use, in the manner by law provided, and if such dedication is made at any time before forced sale, the property becomes exempt, and can not be legally sold. *Id.*

HUSBAND AND WIFE.
See DOWER; WIFE.

INDIANS AND INDIAN COUNTRY.

1. INDIAN COUNTRY—UMATILLA AGENCY.—Since the repeal of section 1 of the Indian intercourse act of 1834 (4 Stat. 129), by section 5596 of the R. S., the only Indian country in the United States within the purview of that phrase, as used in chapter 4, title 28, of the R. S., are the tracts of land set apart by the authority of the United States, for the exclusive use and occupancy of particular Indian tribes, and known as Indian reservations; and the Umatilla reservation in Oregon is such Indian country. *United States* v. *Martin*, 473.
2. CRIMES COMMITTED BY OR AGAINST AN INDIAN.—In the exercise of its constitutional power to regulate intercourse with the Indian tribes, congress may define and punish crimes committed by white men upon the person or property of an Indian, and *vice versa* within as well as without the limits of a state. *Id.*
3. MURDER ON THE UMATILLA RESERVATION.—Congress having provided for the punishment of murder committed in the Indian country (sections 2145, 5329, R. S.), the United States circuit court for the district of Oregon has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man; and therefore it is a violation of section 5398 of the R. S., for any one to resist or obstruct the execution of an order made by a circuit court commissioner, engaged in the examination of an Indian charged before him with the commission of murder, under such circumstances. *Id.*

INJUNCTION.

1. INJUNCTION—JURISDICTION TO ENJOIN BOARD OF SUPERVISORS FROM PASSING AN ORDINANCE.—The courts have jurisdiction to enjoin the board of supervisors of a municipal corporation from passing an ordinance, which is not within the scope of their powers, where the passage of such ordinance would work an irreparable injury; and where a proper bill is presented, the circuit court of the United States, or a judge thereof, is authorized, by statute, to issue a restraining order to preserve the rights of the parties *in statu quo*, until the question, as to the right of the complainant to an injunction, can be fully heard, and determined. *Spring Valley Water Works* v. *Bartlett*, 555.

2. ORDINANCE VOID ON ITS FACE.—Where an ordinance would be void on its face, by reason of its unconstitutionality, and no irreparable injury could result from its mere passage, there being an adequate remedy at law against any attempt to enforce it, after its passage, a court of equity will not enjoin its passage. *Id.*
3. VOID ORDINANCE—IRREPARABLE INJURY.—But, where an ordinance would be void for want of authority to pass it, yet, if irreparable injury would result from its mere passage, or where there is the physical power to execute the void ordinance, notwithstanding its invalidity, by means of the instrumentalities provided, and the only adequate remedy against an irreparable injury arising from its actual enforcement after its passage, is an injunction, the court may enjoin the passage of the ordinance. There appears to be no sound reason why the court should not interfere at one stage of the proceedings, as well as at another. *Id.*

INSTRUCTIONS TO JURY.

See NEGLIGENCE, 5.

INSURANCE—FIRE.

1. FIRE INSURANCE—CONTRACT FOR.—A contract for insurance against loss by fire is a contract of indemnity; and a contract to that end with a person who has no insurable interest in the property or cannot sustain any pecuniary loss by injury thereto is a mere wager, contrary to public policy and void. *Spare* v. *Home Mutual Ins. Co.*, 618.
2. INSURABLE INTEREST.—Any person who has a legal or equitable interest in property, or is so related to it that an injury to it may cause him pecuniary loss, has an insurable interest therein. *Id.*
3. JUDGMENT CREDITOR.—A judgment creditor has an insurable interest in the property of his debtor; but he cannot recover from the insurer upon an injury thereto as for a loss to himself, unless he also shows that the judgment debtor has not sufficient property left out of which the judgment can be satisfied. *Id.*
4. VOID CONTRACT—ESTOPPEL.—While the insurer may be estopped to insist on conditions and restrictions contained in a policy issued with a knowledge of facts inconsistent therewith, neither party to a contract of insurance which is void, as being contrary to public policy, is estopped to deny its legality. *Id.*

INSURANCE—LIFE.

1. CERTAINTY.—A contract to issue a plain life insurance policy upon the life of the applicant for fifteen thousand dollars, payable to his wife, according to the form in use by the company, is sufficiently certain to be enforced; and if there is any extrinsic reason why it should not be enforced, as that it was procured by fraud or falsehood, it must be set up as a defence. *Hebert* v. *Mut. L. Ins. Co.*, 198.

INTEREST.

See DAMAGES.

JUDGMENT—FINAL.

See PRACTICE, 7.

JURISDICTION.

1. JURISDICTION.—Where alienage is the jurisdictional fact, all the parties on one side of the controversy must be aliens, and all on the other side citizens. *Dannmeyer* v. *Coleman*, 51.

2. JURISDICTION IN STOCKHOLDER'S SUIT.—Whether, where an alien stockholder of a California corporation sues California corporations, and citizens of California in the United States courts, on behalf of himself and all other stockholders, it is not necessary to allege that he and all stockholders on whose behalf he sues are aliens, *quære? Id.*

3. SAME.—Whether, where an alien stockholder of a California corporation seeks an accounting in equity, between such California corporation and several other corporation and citizens of California, the United States courts have jurisdiction, *quære? Id.*

4. SEVERAL STOCKHOLDERS' SUITS.—Whether each owner of a share of stock can bring a suit on his own behalf, and on behalf of all other stockholders for the same grievances, *quære? Id.*

5. TERRITORY, NOT A STATE.—The ruling in *New Orleans* v. *Winter* (1 Wheat. 91), that a territory is not "a state" within the meaning of that term as used in the constitution in making the grant of judicial power to the United States, and that, therefore, a resident of the former cannot sue in the national courts, as a citizen of a state, followed but questioned. *Watson* v. *Brooks*, 316.

6. ACTION IN THE NATIONAL COURTS BY THE ASSIGNEE OF A PROMISSORY NOTE.—The assignee of a promissory note may now sue in the national courts without reference to the citizenship of his assignor (18 Stat. 470); and if the assignment is absolutely and legally made, the motive which induced it in no way affects the right of the assignee to sue in said courts. *Collinson* v. *Jackson*, 357.

7. LICENSEE ONLY LIABLE FOR ROYALTY.—The only remedy of a patentee against a party manufacturing under a license, is upon the contract granting the license for the royalty agreed upon. *Kelly* v. *Porter*, 482.

8. JURISDICTION—LICENSE.—An action by the patentee against his licensee for the stipulated royalty, presents no question of patent law, and no subject-matter, which can give the national courts jurisdiction on that ground. *Id.*

9. COUNTY ROAD—JURISDICTION TO ESTABLISH.—The county court has no jurisdiction of an application to establish a county road, except upon the petition of twelve householders of the vicinage, and notice to the persons concerned, as prescribed in sections 2 and 3 of the road law. (Or. Laws, 721.) *Burns* v. *Mult. Railway Co.*, 543.

10. IDEM—ORDER ESTABLISHING.—An order establishing a county road must direct the survey thereof to be recorded; and where the order provided that the survey should be recorded when the petitioners gave a bond to open a portion of the proposed road, which was never done, and the record never made, the road was not established. *Id.*

See EQUITY; INJUNCTION.

LABORERS.

See CHINESE.

LANDLORD AND TENANT.

1. LIABILITY OF STRANGER COMMITTING WASTE.—A stranger committing waste upon premises leased, or held by a particular estate, is liable to the tenant for the injury to the possession, and to the landlord, or reversioner, for the injury to the freehold, or inheritance. The right of each is distinct from that of the other, and satisfaction made to the one, is no bar to an action brought by the other. *Cal. Dry Dock Co.* v. *Armstrong*, 523.
2. LIABILITY OF TENANT FOR WASTE AND HIS RIGHTS AGAINST TRESPASSER. The tenant is answerable to the landlord, or reversioner, for waste done by a stranger. He has his remedy over against the stranger, but the tenant's recovery against the stranger for injuries to the freehold, or reversion, is dependent on his first having satisfied the landlord's claim by payment, or repair of the injured premises; and, in such case, the stranger is liable, only, for the payment, or expense, necessarily incurred. *Wood* v. *Griffin*, 46 N. H. 231, approved and followed. *Id.*
3. EFFECT OF EXPRESS UPON IMPLIED COVENANTS IN A LEASE.—Where the parties to a lease of real property have, expressly, covenanted to repair, it seems, that the express covenant takes the place of the implied covenant, and becomes the measure of the tenant's liability. *Id.*
4. RIGHT OF TENANT AGAINST TRESPASSER WHERE TENANT HAS COVENANTED TO REPAIR.—It being admitted that in a case, in which the tenant has expressly covenanted to repair, such tenant has a right to maintain an action against a stranger committing waste, for injuries done to the freehold: *Held*, that such right of action does not accrue in favor of a tenant, until he has paid, or satisfied, his landlord, or repaired the premises. *Id.*
5. COMPLAINT FAILING TO STATE SATISFACTION OR REPAIRS MADE, IS DEMURRABLE.—A complaint setting forth the fact of a lease containing a covenant by the tenant to repair, and an injury to the freehold by a trespasser (defendant in the action), and further alleging, that, by reason of the tortious act of the trespasser, the tenant (plaintiff in the action) has become, and is, absolutely liable, and indebted to the landlord for the damages resulting from the trespass, viz. the necessary cost of repair, but which fails to aver, that the landlord's claim has been satisfied, or that any expenditures in repair have been made by the tenant, does not state facts sufficient to constitute a cause of action. *Id.*

LEGISLATIVE JOURNALS.

1. JOURNALS OF LEGISLATURE, COURT WILL NOTICE.—The Constitution of California (Sec. 15, Art. IV) provides that "on the final passage of all bills they shall be read at length and the votes shall be by yeas and nays upon each bill separately, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under this provision the court, to inform itself, will look to the journals of the legislature, and if it appear therefrom that the bill did not pass by the constitutional majority, then it will not be regarded as a law. *San Mateo Co.* v. *S. P. R. R. Co.*, 238.
2. STATUTE NOT PASSED.—The journals of the Legislature show that the act of March 14, 1881, mentioned in the opinion, never became a law. *Id.*

LIMITATIONS OF ACTIONS.

1. LIMITATION—LIFE ESTATE AND REMAINDER.—When the husband has a life estate in the lands of the wife and she the remainder, the statute of limitations runs against him in respect to such life estate, but not against the wife in respect to the remainder, during the continuance of such life estate; and when such life estate is lost by an adverse possession sufficient to bar an action by the husband for the recovery thereof, a conveyance of the premises by the husband and wife only passes the wife's interest, the remainder, and therefore does not enable their grantee to maintain an action for the possession during the life of the husband. *Stubblefield* v. *Menzies*, 41.
2. STATUTE OF LIMITATIONS—REPEAL BY IMPLICATION.—By the law of Oregon since May 1, 1854, an action to recover possession of real property was barred by an adverse possession of twenty years, and in case of a married woman the limitation did not include the period of coverture; and during the same time a married woman might bring an action to recover her separate property without joining her husband therein: on October 17, 1878, an act was passed (Ses. L., p. 21), reducing this period to ten years, and providing that the same shall not be extended more than five years by reason of the disability of marriage; and at the same session of the assembly, an act was passed (Ses. L., p. 92), on October 21st, concerning the rights and liabilities of married women, and the relation between husband and wife, "which provided (section 7) that a wife might prosecute and defend all actions at law or in equity, for the preservation and protection of her rights and property, as if unmarried:" *Held*, that the passage of the second act did not affect the first one, and that notwithstanding it, a married woman was entitled to five years in addition to the time allowed an unmarried one, within which to bring an action for the recovery of the possession of her real property. *Id.*
3. THE STATUTE OF LIMITATIONS of California applies to both legal and equitable causes of action; and an action for relief on the ground of fraud is barred in three years, the cause of action not to be deemed to have accrued till the discovery by the aggrieved party of the facts constituting the fraud. *Dannmeyer* v. *Coleman*, 51.
4. DEMURRER.—Where it appears that the fraudulent acts constituting the cause of action were performed more than three years before the filing of the bill, a demurrer will be sustained, unless it also appears that the facts constituting the fraud were not discovered till within three years. *Id.*
5. KNOWLEGE OF FRAUD.—The means of knowledge of fraud are equivalent to actual knowledge. *Id.*
6. LAPSE OF TIME.—Mere lapse of time is a defence in equity in cases not within the operation of the statute of limitations. *United States* v. *Tichenor*, 142.
7. SUIT FOR PARTITION—STATUTE OF LIMITATIONS.—The wife of a married settled under section 4 of the Donation act, died after final proof by the settler of compliance with the act and before the issue of the patent: *Held*, 1. That the half of the donation to which she was or would have been entitled, was thereupon granted, by the act, to her surviving husband and children in equal parts as the direct donees of the United States;

and, 2. The statute of limitations did not commence to run against the right of the heirs of said husband to maintain a suit against his vendees of certain distinct portions thereof, for a partition of their interests in said half of said donation, until the same was formally and finally divided by the surveyor-general as aforesaid. *Traver* v. *Tribou*, 511.

MARRIED WOMAN.

See DOWER; WIFE.

MEXICAN GRANT.

1. MOQUELAMOS GRANT.—Where a claim was filed for the confirmation of a Mexican grant of eleven leagues, within exterior boundaries containing three times that quantity of land, and the surveyor-general, in extending the public surveys, found the grant within the sphere of his operations, and surveyed it in advance of confirmation, in pursuance of the statute of 1852 (10 Stat. 90), reserving nearly double the quantity necessary to satisfy the grant, which survey was acquiesced in by the claimant, and the surplus surveyed into sections, platted, and returned to the land office as public lands, which surplus was thereafter treated as public lands by the government, opened to pre-emption, offered for public sale by proclamation of the president, and afterwards opened to private entry and homesteads, patents being issued therefor for all such purposes, and to satisfy a congressional grant to the Central Pacific Railroad Company; *it seems*, that such surplus will be regarded as emancipated from the claim of the Spanish grant, and that the patents issued therefor in the usual course of the ordinary business of the land office, and to give effect to congressional grants as public lands, will be regarded as valid. *United States* v. *C. P. R. R. Co.*, 81.
2. EX PARTE SURVEYS AS EVIDENCE.—*It seems* that an *ex parte* survey, made by direction of the commissioner of the land office, of the exterior boundaries of a rejected Spanish grant, many years after the rejection, and after the lands embraced in the supposed grant have been regularly officially surveyed and disposed of as public lands, is not admissible as evidence on the part of the government in a suit to vacate a patent. *Id.*
3. PATENT—LEGAL TITLE.—M., a claimant under title derived from the original grantee of a part of the lands embraced in a Mexican grant, obtained a decree of confirmation on which a patent was issued, and other claimants of the same land under title also claimed to have been derived from the same original grantee, and whose claim had been confirmed prior to the issue of the patent to M., obtained patents for the same land some years subsequent to the issue of the patent to M. *Held:* 1. That the issue of the patent to M. vested the entire legal title in him, and left nothing in the United States upon which the subsequent patents could operate, and consequently nothing passed by them. With the issue and delivery of the senior patent, all authority or control of the executive department over the land passed away. 2. That under such circumstances in an action at law the senior patent is conclusive as to the title, and cannot be assailed collaterally by the holders of the junior patent. 3. The only remedy of the junior patentees is in equity to charge the holder of the senior patent, if there are equitable grounds for so doing, with a trust for their benefit.

4. While in a proper sense it may be true that in acting on a claim for land based on a Mexican grant, the United States has no interest in the derivative title from the original grantee of the Mexican government, yet where one held such a derivative title prior to the transfer of California to the United States, he was one of the parties protected by the stipulations of the treaty, and it would seem was as much entitled to have his deed from the original grantee passed upon, as he was to have the original grant itself passed upon. 5. The cases in which it has been held admissible in an action at law between the holders of senior and junior patents for the same land, to examine into the equities for the purpose of attaching a prior equity to the junior patent, are all cases where the parties have sought to acquire lands belonging to the United States *upon different and independent adverse claims*, and have no application to a case where both parties claim under the same original grant or right, though by different derivative titles. 6. Where two parties claim the same land under different derivative titles from the original grantee of the Mexican government, and one of them obtains a patent for the lands, the right, if any, of the other to relief in equity accrues on the day the patent issues. The cause of suit is full, complete, and perfect on that day, and is not dependent, and cannot rest, upon any subsequent proceeding or patent. *Semble:* Where such equitable action is not commenced until a time when by the state statute of limitations it would be barred, the United States circuit court, although a court of equity, and not absolutely bound by that statute, may in analogy thereto, hold the cause to be stale, and decline on that ground to sustain a bill. *The question* whether a patent gives a new cause of action so as to avoid the statute of limitations, where both parties claim under the same grant, *not determined*. *Hayner* v. *Stanly*, 214.

4. MEXICAN GRANT, LEGAL AND EQUITABLE TITLE.—The holder of a Mexican grant containing a quicksilver mine conveyed the mine, together with one thousand acres of land surrounding the mine, to A., who went into possession, and he and his grantees continued in possession, working the mine for twenty-five years. After such conveyance the holder of the grant executed a second conveyance to B., also embracing the mine and the land before conveyed to A. The grantees of B. presented the grant for confirmation, which was duly confirmed, and a patent in due form was issued to the confirmees. *Held:* That the legal title derived under the patent would be controlled for the benefit of the grantees of A., who held the better title under the first conveyance. *Santa Clara M. A.* v. *Quicksilver M. Co.*, 330.

5. LOCATION OF LAND INDEFINITELY DESCRIBED.—Where a mine, together with one thousand acres of land, "around, circumjacent, and adjoining said mine," is conveyed by the owner of a larger tract, the land will be located as nearly as practicable in a square form around the mine, taking the mine as the center of the location, and the grantor, by subsequent conveyances of the larger tract in two parts to other parties, cannot affect this right of location by the prior grantee. *Id.*

6. MINING PARTNERS—TENANTS IN COMMON.—Where a mine, together with the surrounding lands, is conveyed to, and the mine is worked by, an unincorporated association of individuals in the usual mode, as in the case

of mining partnerships in California, the members of the association are tenants in common of the mine and the land so held. *Id.*

7. SALE UNDER DECREE OF PROPERTY OF MINING PARTNERSHIP.—Where a bill is filed by a member of a mining partnership to wind up the affairs of the association, some of the members being omitted from the bill because of the impracticability of bringing them all before the court, and a decree is made dissolving the association, directing the mines and lands of the company to be sold, the debts to be paid, etc., and a sale of the mines and lands of the association is made in pursuance of the decree, the title to the undivided interests in the mine and lands of those not parties to the suit will not be affected by the decree and sale. *Id.*

MINES AND MINING.

1. MEXICAN GRANT, LEGAL AND EQUITABLE TITLE.—The holder of a Mexican grant containing a quicksilver mine conveyed the mine, together with one thousand acres of land surrounding the mine, to A., who went into possession, and he and his grantees continued in possession, working the mine for twenty-five years. After such conveyance the holder of the grant executed a second conveyance to B., also embracing the mine and the land before conveyed to A. The grantees of B. presented the grant for confirmation, which was duly confirmed, and a patent in due form was issued to the confirmees. *Held:* That the legal title derived under the patent would be controlled for the benefit of the grantees of A., who held the better title under the first conveyance. *Santa Clara M. A.* v. *Quicksilver M. Co.*, 330.

2. LOCATION OF LAND INDEFINITELY DESCRIBED.—Where a mine, together with one thousand acres of land, "around, circumjacent, and adjoining said mine," is conveyed by the owner of a larger tract, the land will be located as nearly as practicable in a square form around the mine, taking the mine as the center of the location, and the grantor, by subsequent conveyances of the larger tract in two parts to other parties, can not affect this right of location by the prior grantee. *Id.*

3. MINING PARTNERS—TENANTS IN COMMON.—Where a mine, together with the surrounding lands, is conveyed to, and the mine is worked by, an unincorporated association of individuals in the usual mode, as in the case of mining partnerships in California, the members of the association are tenants in common of the mine and the land so held. *Id.*

4. SALE UNDER DECREE OF PROPERTY OF MINING PARTNERSHIP.—Where a bill is filed by a member of a mining partnership to wind up the affairs of the association, some of the members being omitted from the bill because of the impracticability of bringing them all before the court, and a decree is made dissolving the association, directing the mines and lands of the company to be sold, the debts to be paid, etc., and a sale of the mines and lands of the association is made in pursuance of the decree, the title to the undivided interests in the mines and lands of those not parties to the suit will not be affected by the decree and sale. *Id.*

5. PATENT TO LANDS EMBRACING MINES.—Where a patent to lands is issued by the United States, it carries all mines in the lands patented, to which no right has attached at the time the patent issues. *Pacific C. M. & M. Co.* v. *Spargo*, 645.

6. PATENT—COLLATERAL ATTACK.—The validity of a patent can not be questioned collaterally, in an action to recover the land patented. *Id.*

7. PATENT RELATES TO ENTRY.—Where a purchaser enters and pays for a tract of public lands, receiving a certificate of purchase therefor, the patent, subsequently issued in pursuance of such certificate, relates to, and takes effect from, the date of the entry. *Id.*

8. RESERVATION IN PATENT OF RIGHT TO WORK A MINE.—Where a patent to public land, reserves the right of a proprietor of a mining vein or lode, to extract and remove his ore therefrom, should it be found to penetrate, or intersect, the lands granted by the patent, the reservation refers only to parties who are proprietors at the time when the right of the patentee attaches to the land, or the date of the entry, or patent. *Id.*

See MINING CORPORATION.

MINING CORPORATION.

1. LIABILITY—STOCKHOLDERS—MINING CORPORATION.—There being no *subscribed* stock, stockholders in *mining* corporations, organized under the laws of this State, are not liable, by contract, or by operation of law, to pay to the corporation the nominal par value of their stock, even though such nominal value has not been paid in. *In re South Mountain Con. M. Co.*, 366.

2. NO CONTRACT TO PAY FULL AMOUNT OF STOCK.—Purchasers of stock in such corporations are not, by contract, or by operation of law, bound to pay to the corporation the nominal par value of their stock; their only liability is the constitutional, and statutory, personal, liability for their proportion of the debts and liabilities of the corporation, and the liability of their stock to assessment by the corporation. *Id.*

3. POWER TO ASSESS NOT ASSETS.—The power to levy assessments by the corporation itself, is not an asset, or trust fund, and it does not pass as such to a court of bankruptcy; nor can such court enforce such liability of a stockholder to assessment by the corporation itself against stockholders of such corporations to discharge the liabilities of an insolvent mining corporation. *Id.*

4. PERSONAL ACTION.—As to whether a personal action will lie against a stockholder to recover an assessment levied by such corporations, *quære? Id.*

MINING PARTNERSHIPS.

See MINES AND MINING.

MONEY.

See PLEADINGS, 3.

MORTGAGE.

1. MORTGAGE.—The conveyance of lands by the Southern Pacific Railroad Company, to D. O. Mills and Lloyd Tevis, in trust, to secure the payment of certain "first mortgage bonds," in the usual form of a mortgage, except being to trustees, with a condition of defeasance, providing, that upon the payment of the bonds, "this indenture and the estate hereby granted shall cease and determine," etc., with a clause reserving to the grantor the "sole and exclusive management and control" of the lands,

and only providing for an entry, foreclosure, and sale by the trustees, upon default and subsequent demand by the bondholders, is in substance and law a mortgage under the California code; and the right of possession until default, and a demand by the bondholders, remain in the mortgagor, or grantor. *S. P. R. R. Co.* v. *Doyle*, 60.

2. MORTGAGE DEFINED.—Under the code, a mortgage is a "contract by which specific property is hypothecated for the performance of an act without the necessity for a change of possession." The mortgage may confer a power of sale upon the mortgagee, "or any other person," after breach of the obligation secured. *Id.*

3. MORTGAGE—TRUST.—Where the mortgage confers a power of sale upon any person, other than the party secured, it necessarily, also, embraces a trust; but it does not necessarily give a right of possession of the mortgaged property to the trustee, before condition broken. *Id.*

4. TRUST DEED UNDER CODE.—If the instrument in question, under the code, is strictly a trust deed, rather than a mortgage, the result is the same in this case; for it conveys no right to the possession, management, or control of the lands upon the trustees, till after default, and a demand by the bondholders. *Id.*

5. EXPRESS TRUSTS may be created under the California code to sell real property and apply or dispose of the proceeds, but it must be "in accordance with the instrument creating the trust," and, in this instance, the lands conveyed by the terms of the deed are left in the sole and exclusive management, control, and possession of the grantor till default and demand. *Id.*

6. TITLE, WHERE VESTED.—Under the code, every valid express trust vests the title in the trustees, subject to the execution of the trust, and not in the beneficiaries. *Id.*

7. SAME.—Whatever the estate is, be it great or small, created by the trust deed, the whole is vested in the trustees; but *what* the estate is, which vests in the trustees, its extent, and quality, depends wholly upon the terms of the instrument creating the trust, and not upon the code. *Id.*

8. ESTATE NOT EMBRACED IN THE TRUST.—Under the code, "where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust. *Id.*

9. TRUST ESTATE.—The sole, exclusive management, control, and possession of the land in question, being by the express terms of the trust deed, or mortgage in question, left in the grantor till default and demand by the bondholders, this portion of the estate was not embraced in the trust, and, in the language of the code, "is left in the author of the trust"—the Southern Pacific Railroad Company. *Id.*

10. RIGHT OF ACTION.—The right of possession, management, and control of the lands, embraced in the mortgage, or trust deed, whichever it may be, being by the terms of the instrument left in the grantor, the right of action to recover possession against trespassers, is in the Southern Pacific Railroad Company—the grantor and author of the trust. *Id.*

11. MORTGAGE.—The mortgagee of a mortgage to secure an antecedent debt is not regarded as a purchaser, and, therefore, the lien of his mortgage

will be postponed to that of a prior but unrecorded one. *Bybee* v. *Hawkett*, 176.

12. SUIT TO ENFORCE THE LIEN OF A MORTGAGE.—In a suit to enforce the lien of a mortgage, a subsequent mortgagee, who is made defendant on that account, can not set up a claim or have a decree against the plaintiff for the amount of his debt, upon the ground that the plaintiff is personally liable to him therefor, as partner of his mortgagor. *Id.*

NEGLIGENCE.

1. NEGLIGENCE OF FELLOW-SERVANT.—The employer is not liable to a servant for an injury resulting from the negligence of a fellow-servant in the same line, or department of employment; provided the employer exercise due care in the selection of competent servants. *Buckley* v. *G. & C. S. M. Co.*, 394.
2. WHO ARE FELLOW-SERVANTS.—The runner of a steam-engine employed in lowering men and material, and hoisting rock in sinking a shaft, is a fellow-servant in the same line, or department of service, within the rule, with the men in the shaft engaged in excavating the shaft and loading the rock to be hoisted. *Id.*
3. NO WARRANTY—ONLY DUE CARE REQUIRED.—The employer does not warrant the competency of his servants. He is only bound to exercise due care in the selection of careful and competent men for the service to be performed. *Id.*
4. EVIDENCE OF INCOMPETENCY.—The mere fact that an accident occurred, though evidence of negligence on that particular occasion, is not, by itself, sufficient evidence to authorize a jury to find that the party so negligent is not a careful and competent man for the service in which he was engaged. *Id.*
5. INSTRUCTION TO JURY IN ABSENCE OF EVIDENCE.—Upon the close of plaintiff's testimony, if the evidence is insufficient to justify a verdict for plaintiff, the court will instruct the jury to find for the defendant. *Id.*

See ADMIRALTY.

NEW TRIAL.

See FRAUD AND FRAUDULENT CONVEYANCES; PRACTICE, 6–9.

NORTH PACIFIC RAILROAD.

1. GRANT TO THE NORTHERN PACIFIC RAILWAY COMPANY.—By the act of July 2, 1864 (13 Stat. 365), the odd-numbered sections along the line of the Northern Pacific Railway Company for forty miles on either side of the line in the territories, and twenty miles in the states, are set apart and devoted to the construction of the road of said corporation; but said act is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely, when and as fast as any twenty-five miles of said road is constructed and accepted by the United States; and in the mean time, the legal title to the unearned and unpatented sections is in the United States, who may therefore maintain legal proceedings against any one that unlawfully cuts timber thereon. *United States* v. *Childers*, 171.

See EXPRESS COMPANIES.

NUISANCE.

1. MULTIFARIOUSNESS—NUISANCE.—Several parties owning extensive mines at various points on the affluents of the Yuba river, work them independently of each other by the hydraulic process, discharging their waste earth and other *debris* into the stream, whence it flows down into the main river, where the *debris* becomes mingled into one indistinguishable mass, passes on, and is deposited along the course of the river in the valley below, burying valuable lands and creating a public and private nuisance. A bill in equity by a party injured against all the parties thus contributing to the nuisance to enjoin it, is not demurrable as being multifarious, or for a misjoinder of parties defendant. *Woodruff* v. *N. B. Grav. M. Co.*, 628.

2. SAME.—The parties thus creating the nuisance may be joined in equity both on the ground that they co-operate, in fact, and actually contribute to the nuisance, the injury being the single result of the action of the *debris* combined and operating together long before it reaches the place where the injury is effected. Also, on the ground of avoiding a multiplicity of suits. *Id.*

3. NUISANCES—PARTIES—TENANT IN COMMON.—One tenant in common of land injured by a public and private nuisance, may sue to enjoin the nuisance, without making his co-tenant a party, either as complainant, or defendant. *Id.*

OBSCENE LETTERS.

1. WRITING.—A sealed letter deposited in the mail addressed to some one is not a writing or publication within the purview of the first clause of section 3893 of the revised statutes, declaring obscene, etc., books, writings, etc., or "other publication of an indecent character," non-mailable. *United States* v. *Loftis*, 194.

2. LETTER.—A sealed letter is not within the prohibition of said section 3893, however indecent or obscene in its contents; but if there is any such delineation or language put upon the envelope containing it, it thereby becomes non-mailable, and the person depositing it in the mail thereby commits a crime. *Id.*

OFFICERS—DISQUALIFICATION.

See CANDIDATES FOR OFFICE.

ONUS PROBANDI.

See BURDEN OF PROOF.

ORDINANCES OF CITY.

1. VOID ORDINANCE—IRREPARABLE INJURY.—But, where an ordinance would be void for want of authority to pass it, yet, if irreparable injury would result from its mere passage, or where there is the physical power to execute the void ordinance, notwithstanding its invalidity, by means of the instrumentalities provided, and the only adequate remedy against an irreparable injury arising from its actual enforcement after its passage, is an injunction, the court may enjoin the passage of the ordinance. There appears to be no sound reason why the court should not interfere

at one stage of the proceedings, as well as at another. *Spring Valley W. W.* v. *Bartlett*, 555.

2. UNCONSTITUTIONAL ORDINANCE.—An ordinance which appears upon its face to violate the fourteenth amendment to the constitution of the United States, is void, and it can cast no legal cloud upon the rights of the parties, apparently affected by it. All parties are, legally, presumed to know its invalidity. *Id.*

PARTIES.

1. INDISPENSABLE PARTIES.—The owners of the land at the time of filing a bill in equity to vacate a patent of the United States, are indispensable parties to the bill; and when it is filed against the patentee alone, after he has conveyed the land and ceased to have any interest in it, the bill will be dismissed for want of necessary parties. *United States* v. *C. P. R. Co.*, 81.

2. SAME—PARTIES.—Where seven *parties* agree to enter into a partnership at a future day, the language being, "they have agreed to become partners," and four out of the seven, afterwards, jointly refuse to enter into the partnership, and thereby commit a breach, by reason of which each of the others sustains several, but no joint damages, each party so sustaining several damages may maintain an action against the parties jointly committing the breach, without joining, either as plaintiffs or defendants, the others who have committed no breach. *Goldsmith* v. *Sachs*, 110.

3. PARTIES JOINTLY COMMITTING A BREACH of a contract may all be joined as defendants. *Id.*

4. PARTNERS.—INDISPENSABLE PARTIES.—Where a bill in equity is filed against one of the members of a copartnership, to set aside partnership transactions, and vacate a conveyance of real estate, assets of the partnership, but held in the name of one of the partners for the benefit of the firm, and for an account, all the partners are indispensable parties to the bill. *Bell* v. *Donohoe*, 435.

5. INDISPENSABLE PARTIES TO STOCKHOLDERS' BILL.—A stockholder of a New York corporation filed a bill in equity on behalf of himself and such other stockholders of said corporation as should choose to come in, against a California corporation and other defendants, to set aside transactions between the said New York corporation and the other defendants; also other transactions dependent thereon, without making the corporation of which he is a stockholder a party to the bill: *Held:* That the New York corporation, of which complainant is a stockholder, is an indispensable party to the bill. *Id.*

6. REQUISITES OF STOCKHOLDERS' BILL.—Bill, also, held insufficient, as not containing the allegations essential to a stockholder's bill as established in *Hawes* v. *Oakland*, 104 U. S. 450; *Huntington* v. *Palmer*, Id. 482, and *Dannmeyer* v. *Coleman*, *ante*, 51. *Id.*

See EQUITY; NUISANCE.

PARTITION OF LAND.

1. PARTITION OF LANDS.—A partition of a tract of land, by a judicial decree, between part owners of the whole tract, does not change the char-

acter or origin of the title of any of the parties, but the portion which each takes in severalty under the decree is, in contemplation of law, the very portion which belonged to him as tenant in common, and he holds it thereafter under the same title and subject to the same obligations, covenants, and contracts as before. *Traver* v. *Baker*, 535.

See LIMITATIONS OF ACTIONS.

PARTNERSHIP.

1. CONTRACT FOR FUTURE PARTNERSHIP.—Where several parties agree to enter into partnership on a future day, but a part refuse to enter upon the business in pursuance of the terms agreed upon, and the partnership is never launched, whereby the others are injured, the only remedy is an action at law for the breach. *Goldsmith* v. *Sachs*, 110.
2. SAME—PARTIES.—Where seven *parties* agree to enter into a partnership at a future day, the language being, "they have agreed to become partners," and four out of the seven, afterwards, jointly refuse to enter into the partnership, and thereby commit a breach, by reason of which each of the others sustains several, but no joint damages, each party so sustaining several damages may maintain an action against the parties jointly committing the breach, without joining, either as plaintiffs or defendants, the others who have committed no breach. *Id.*
3. PARTIES JOINTLY COMMITTING A BREACH of contract may all be joined as defendants. *Id.*
4. VOID FOR UNCERTAINTY.—Where the contract provides, that "the business of the partnership shall be buying, selling, and dealing in dry goods, and furnishing goods, and such other merchandise as may be convenient and profitable to all parties concerned," the description of the business is not so vague and indefinite as to render the contract void for uncertainty. *Id.*
5. DAMAGES.—Where the complaint presents a case for some damages, even, if only nominal, it is not necessary, on demurrer, to determine the rule of damages. *Id.*
6. JOINT AND SEVERAL CONTRACTS.—Rule in regard to parties stated, where contracts are not in express terms, either joint or several; or when a contract will be regarded as joint; and when as several. *Id.*
7. PARTNERSHIP.—A contract between three persons to operate a "mining property as a company," creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of said enterprise; and this, notwithstanding the fact that such contract also provides that there shall be no division of profits between the parties until two of them are reimbursed therefrom the money expended in the purchase of two thirds of the property from the other one, and the cost of improving the same. *Bybee* v. *Hawkett*, 176.
8. MORTGAGE.—The mortgagee of a mortgage to secure an antecedent debt is not regarded as a purchaser, and, therefore, the lien of his mortgage will be postponed to that of a prior but unrecorded one. *Id.*
9. SUIT TO ENFORCE THE LIEN OF A MORTGAGE.—In a suit to enforce the lien of a mortgage, a subsequent mortgagee, who is made defendant on that account, cannot set up a claim or have a decree against the plaintiff for the amount of his debt, upon the ground that the plaintiff is personally liable to him therefor, as partner of his mortgagor. *Id.*

10. PARTNERSHIP WITH A MEMBER OF ANOTHER PARTNERSHIP.—Although A may be interested with B in his interest in a partnership, consisting of B and two others, that does not make him a member of said last-mentioned partnership. *Id.*

PASSENGERS.

1. TAKING PASSENGERS ON BOARD.—Passengers who go on board a vessel openly and in the usual way are presumed to have been taken on board by the master within the purview of sections 4252–4253 of the revised statutes. *United States* v. *Thomson*, 122.

2. INTENT TO COMMIT CRIME.—Neglect in the discharge of a duty or indifference to consequences is in many cases equivalent to a specific criminal intent. *Id.*

3. CASE IN JUDGMENT.—The defendant being the master of a vessel under charter at the port of Hongkong to carry passengers to Portland, Oregon, permitted the charterers to load her under the inspection of the port officers without himself knowing or taking any steps to know how many passengers were on board; and upon arrival in Oregon it was found that there were one hundred and sixty passengers in excess of the number allowed to be carried by sections 4252–4253 of the revised statutes. *Held*, that it was the duty of the defendant to have taken steps before leaving the port to ascertain how many passengers he had on board, and that the omission of this duty was such negligence on his part as made him guilty of a violation of the statute. *Id.*

4. SPACE APPROPRIATED TO PASSENGERS.—A space upon a vessel bringing passengers into the United States under the act of March 3, 1855 (10 Stat. 715, sec. 4252, R. S.), is not "appropriated" to their use within the meaning of the term or the object and policy of the statute, unless it is given up to their *exclusive* use; and, therefore, the dining saloon of a steamship carrying Chinese passengers from Hongkong to Portland, Oregon, in which such passengers were allowed to go and come during the day, but to which no number of them were allotted or assigned, and in which they neither ate nor slept, was not a space appropriated to their use. *United States* v. *Nicholson*, 162.

5. BERTHS ON STEAM VESSELS.—The provisions of section 2 of the act of March 3, 1855 (10 Stat. 716, sec. 4255 of the R. S.), relating to the construction and occupation of berths on vessels carrying passengers from foreign ports to the United States, are not deemed applicable to steam vessels. *The Devonshire*, 209.

6. RE-ENACTMENT OF STATUTE—FORMER CONSTRUCTION OF IT.—Where a statute has received a judicial construction and is afterwards re-enacted by the legislature of the same or another country, it is presumed to have been passed as construed. *Id.*

PATENTS AND PATENT RIGHTS.

1. MISNAMING PATENTED DEVICE.—Where the specifications and drawings, as a whole, clearly describe the construction and operation of a machine, the fact that some device in it is called by a wrong name, or a word is not used with strict mathematical accuracy, will not vitiate the patent. *Foye* v. *Nichols*, 201.

2. AN IMPROVEMENT UPON A PATENTED MACHINE will not prevent the improved machine from being an infringement, if it embraces the invention patented. *Id.*

3. TWO PLOWS ON A SHAFT.—Where one feature of a patented invention consists in placing two plows on a shaft with their screws running in opposite directions, the one counteracting the strain of the other in the opposite direction when in use, the patent will be infringed by another machine having similar devices on the opposite ends of a shaft jointed in the middle to admit of setting the opposite plows at different angles, for the purpose of adapting it to different characters of soil. *Id.*

4. USE BY INFRINGER—EVIDENCE OF USEFULNESS.—Where a party embraces and uses in his own machine the invention of another, such use of the patented device is evidence of its usefulness. *Id.*

5. ARTIFICIAL STONE PAVEMENT.—Cross-cutting the larger blocks of artificial stone pavements into smaller ones with a trowel during the process of formation, in the manner described in Molitor and Perine's cases, 7 Saw. 190, is an infringement of the Schillinger patent. *California Artificial Stone Paving Co.* v. *Freeborn*, 443.

6. MARKING JOINTS NOT INFRINGEMENT.—Running the marker described in Molitor and Perine's cases along the line of the surface between the old block and the new one formed against it, without anything being interposed, or any cutting being done between the blocks during the process of formation, is not an infringement of Schillinger's patent. *Id.*

7. PROOF OF INFRINGEMENT BEFORE BILL FILED.—An infringement must be shown to have taken place either by making, selling, or using the article patented, before the filing of the bill, or there can be no recovery. *Slesinger* v. *Buckingham*, 469.

8. ANSWER TO BILL UNDER OATH.—Where the complainant does not waive an answer to the bill under oath, the answer, distinctly denying the material matters alleged, not only makes an issue, but proves it; so that it will require the evidence of two witnesses, or of one witness, and other circumstances equivalent to a second, to overthrow the answer. *Id.*

9. WAIVING ANSWER UNDER OATH.—The great advantage to complainant in many cases under the present rules relating to the competency of witnesses of waiving an answer under oath, pointed out. *Id.*

10. RE-ISSUED PATENT.—The specifications for the re-issue of a patent may be amended by the model deposited in the patent office, as well as by the drawings. *Hendy* v. *Golden State S. & M. Iron Works*, 468.

11. SPECIFICATIONS AMENDED BY MODEL.—Where the original specifications and drawings do not show whether, or not, the machine patented embraced a feature claimed in the re-issued patent, the court cannot say from comparison of the original and re-issued patents, alone, whether the re-issue embraces a feature not indicated in the machine as first patented, without an inspection of the original model deposited in the patent office. *Id.*

12. LICENSE PENDING APPLICATION FOR PATENT—MODIFIED CLAIMS.—An inventor filed in the patent office his specifications, claims, and application for a patent. He then entered into a contract with other parties, describing his invention, setting forth therein that he had filed his specifications and application for a patent, and granting "the exclusive right and privilege of manufacturing and selling the aforesaid goods *under any*

patent that he might obtain by or through his application aforesaid," in a large tract of territory described. Afterwards, upon the requirement of the commissioner, the claims appended to the specifications were mod ified, and in accordance with such modified claims the patent issued. *Held:* That the license covered the patent issued upon the claims as modified. *Kelly* v. *Porter*, 482.

13. LICENSE, WHEN IRREVOCABLE.—A license to use a patent given pending the application for its issue, unlimited as to time, and providing, only, that it should be void on failure to obtain the patent, wherein the licensor covenants to protect the licensee "against any and all persons, during the term of the application for a patent, as aforesaid, and *after he shall have obtained a patent* from the United States government, as aforesaid," is irrevocable by the licensor, without the consent of the licensee. *Id.*

14. LICENSEE NOT AN INFRINGER.—A party manufacturing and selling a patented article, in pursuance of the terms of a licensee from the patentee, cannot be held liable, as an infringer. *Id.*

15. LICENSEE ONLY LIABLE FOR ROYALTY.—The only remedy of a patentee against a party manufacturing under a license, is upon the contract granting the license for the royalty agreed upon. *Id.*

16. JURISDICTION—LICENSE.—An action by the patentee against his licensee for the stipulated royalty, presents no question of patent law, and no subject-matter, which can give the national courts jurisdiction on that ground. *Id.*

17. COMBINATION PATENT—INFRINGEMENT.—A patent for a combination of several elements, is not infringed by a machine which does not embrace all the elements employed to make up the combination, as claimed. *Matteson* v. *Caine*, 498.

18. ANTICIPATION.—A plow standard, with a lug on the upper end, by means of which, it is fastened to the plow-beam by three bolts and nuts, not in line, but arranged in the form of a triangle, is anticipated by a cultivator standard fastened to the beam, or bar, by three bolts, arranged in the form of a triangle, although the head of the standard is square, instead of having a lug; and a standard having a bolt and nut with two dowel pins, similarly arranged, is also an anticipation. *Id.*

PENALTIES AND FORFEITURES.

1. DISCOVERY.—A demurrer will lie to an allegation in a bill, the answer to which may subject the defendant to anything in the nature of a penalty or forfeiture—as an allegation concerning the number of copies sold and on hand of a pirated map. *Chapman* v. *Ferry*, 191.

2. PENALTIES AND FORFEITURES.—The penalties and forfeitures given by section 4965 of the revised statutes (17 Stat. 214), for an infringement of a copyright, cannot be enforced in a suit in equity; and a prayer in a bill, that the plate and unsold copies of a pirated map be delivered up to an officer of the court for cancellation and destruction is demurrable, as asking the enforcement of such forfeiture. *Id.*

PILOTS AND PILOTAGE.

1. TENDER OF PILOT SERVICE.—*Semble*, that a tender of pilot service by a river pilot to a vessel bound on a voyage to Portland, is not valid if

made below Astoria and before the vessel has reached the pilot-ground of such pilot. *The Glaramara*, 22.

2. AMENDMENT OF STATUTE.—*Semble*, that section 1 of the act of December 20, 1865 (Ses. L., p. 33; Or. L., p. 707, sec. 12), giving half pilotage for a tender of pilot service to a vessel navigating the Columbia or Wallamet rivers above Astoria, was passed in contravention of section 22 of article IV of the constitution of the state, and is therefore void; but if considered valid, then section 1 of the act of October 25, 1870 (Ses. L., p. 51; Or. L., p. 710, sec. 27), declaring that such vessel, when "towed by a tug or steamer," should not be required "to take a pilot or pay half pilotage," is also valid, and therefore a pilot is not entitled to recover half pilotage for a tender and refusal of such pilot service. *Id.*
3. PILOT SERVICE—PLACE OF TENDER OF.—A state may permit or require its pilots to tender their services to inward-bound vessels at a greater distance from the shore than three miles, or the outward limit of the pilot ground. *The Whistler*, 232.
4. IDEM—OFFER OF, WHEN SUFFICIENT.—The bark *Whistler* was approaching the mouth of the Columbia river, with intent to enter and load there as soon as one of the three pilot tugs stationed there should come out to her without orders to go elsewhere; and being met by one of said tugs without such orders, she was taken in tow thereby and went in; but on the day before, and while she was standing off and on about thirty miles from the bar, she was hailed by an Oregon schooner pilot, who tendered his services to pilot her in, which were refused. *Held*, that the vessel was "bound in the river," within the meaning of the statute giving full pilotage for the offer and refusal of such services, and having afterwards gone in, the libellant became entitled to such pilotage. *Id.*

PLEADING.

1. JOINT AND SEVERAL CONTRACTS.—Rule in regard to parties stated, where contracts are not in express terms, either joint or several; or when a contract will be regarded as joint, and when as several. *Goldsmith* v. *Sachs*, 110.
2. PROMISSORY NOTE.—A note for five hundred pounds sterling is payable in a certain sum of "money," and, therefore, negotiable and *prima facie* made upon a sufficient consideration. *King* v. *Hamilton*, 167.
3. POUND STERLING.—By section 2 of the act of March 3, 1873 (11 Stat. 603; sec. 3565, R. S.), it is provided that "in the construction of contracts payable in sovereigns or pounds sterling," each pound shall be valued at four dollars eighty-six cents and six and one half mills. *Held*, That in an action upon a note payable in pounds sterling, it is not necessary to aver or prove the value of such pound in money of the United States, but that the court will give judgment for the value of the contents of the note in money of the United States, according to the ratio prescribed by the statute. *Id.*
4. PLEADINGS.—New matter in an answer constituting a defensive allegation should be articled and pleaded separately, and not blended with the response to any article of the libel. *The Whistler*, 232.
5. EXCEPTIONS.—Exceptions to an answer for insufficiency and impertinence are taken for entirely different causes, and therefore they ought not to be taken to the same matter either conjunctively or disjunctively. *Id.*

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but that the court will give judgment for the value of the contents of the note in money of the United States, according to the ratio prescribed by the statute. *Id.*

3. INTEREST ON NOTE.—Where a note is made payable at a future day "with" interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect. *Tanner* v. *Dundee Land Investment Co.*, 187.

PUBLIC LANDS.

1. TIMBER ON PUBLIC LANDS IN OREGON.—The act of June 3, 1878 (20 Stat. 88), giving permission to the residents of Colorado, Nevada, the territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such state is regulated by the act of the same date (20 Stat. 89), providing, among other things, for the sale of timber lands therein. *United States* v. *Smith*, 100.

2. MINERAL DISTRICT.—This term, as used in the first of the said acts of June 3, 1878 (20 Stat. 88), has no application to Oregon, there being no such division or district of the state established, either by law or common reputation. *Id.*

3. CUTTING TIMBER—WHO MAY AND WHAT FOR.—Under the act of June 3, 1878 (20 Stat. 89), persons occupying the public lands in Oregon under the mining, pre-emption, or homestead laws of the United States, may cut and use the timber thereon convenient for the purposes of such occupancy, and may also take other timber from the public lands, if need be, sufficient to maintain the necessary improvements on the lands so occupied; but any cutting or removing timber from the public lands otherwise than this—as with intent to dispose of or wantonly to destroy the same, is a trespass, for which the party guilty of the same is liable, civilly and criminally. (20 Stat. 90.) *Id.*

4. RESERVATION OF PUBLIC LANDS IN OREGON.—By the passage of the donation act of September 27, 1850 (9 Stat. 497), and the amendment thereto of February 14, 1853 (10 Stat. 158), congress disposed of all the public lands in Oregon to persons who were or should become settlers thereon and otherwise comply with the provisions of such act, except, among others, such portions thereof as might be designated by the authority of the president for certain military purposes and "other needful public uses," not exceeding six hundred and forty acres at any one point or place for a fort, nor more than twenty acres for any other purpose. *Held*, 1. That while an order issued by the secretary of war designating a reservation under this act for a military post or station may be presumed to have been made by the authority of the president, until the contrary appears, no such presumption arises in case such order is made by any one else, and therefore an order issued by the military officer in command of the department directing the establishment of a "military reservation" at Port Orford, Oregon, is void and of no effect; 2. That a valid designation of a reservation for military or light-house purposes must indicate or describe with reasonable certainty in some public document or record the

quantity, limits, and location of such reservation; and the same ought to be noted, as soon as practicable, on the plat of the survey of the township; and, 3. That such a reservation, if designated, so as to substantially exceed the quantity allowed by law, is illegal and void. *U. S.* v. *Tichenor*, 142.

5. PATENT ISSUED CONTRARY TO LAW.—When it appears on the face of a patent that it was issued contrary to law, it is void, and a court of law will so pronounce; but nevertheless the United States is entitled to maintain a suit in equity to have such void patent cancelled. *Id.*
6. POSSESSORY RIGHT OF MARRIED SETTLER.—A married settler under the donation act, prior to completion of his residence and cultivation, may abandon or dispose of his possessory right or location without the consent of his wife. *Id.*
7. LANDS—PURCHASE OF, FOR THE UNITED STATES.—A conveyance of lands to the United States is void and inoperative unless the purchase is authorized by congress. Section 3736 of the revised statutes. *Id.*
8. FORT—MEANING OF THE TERM.—The term "fort," as used in the donation act, implies a place of more permanence and strength than a mere frontier camp, post, or station. *Id.*
9. PORT ORFORD.—Congress never authorized or provided for the erection or maintenance of a "fort" at Port Orford. *Id.*
10. PROMISE MADE UNDER ILLEGAL ARREST.—The arrest and eviction of the defendant, William Tichenor, in 1864, from his donation claim, at Port Orford, or that portion of it said to have been a "military reservation," and his subsequent imprisonment by military force and without process of law, were illegal acts, and any promise extorted from him as a condition of his liberation, concerning his future claim to the premises, was and is void and of no effect; neither would a verbal promise of non-claim, however induced or made, be sufficient to affect his right to or interest in the premises. *Id.*
11. ALLEGATION OF FRAUD.—It is not sufficient to allege in a bill to set aside the patent to a "settler" that it was "fraudulently" obtained, by means of "false proof," but the acts constituting the fraud should be substantially stated. *Id.*
12. RESIDENCE AND CULTIVATION OF A "SETTLER."—A settler under the donation act is not required to reside "all over" his claim, nor to cultivate the whole of it, and therefore his proof of residence and cultivation is not false if he actually resided anywhere within the exterior lines of the claim and cultivated any portion of it. *Id.*
13. SALE OF PUBLIC LANDS.—A sale of public lands unauthorized by law is void, and the purchaser thereat acquires no right thereby whether he knew or did not know of such want of authority. *Id.*
14. GRANT TO THE NORTHERN PACIFIC RAILWAY COMPANY.—By the act of July 2, 1864 (13 Stat. 365), the odd-numbered sections along the line of the Northern Pacific Railway Company for forty miles on either side of the line in the territories, and twenty miles in the states, are set apart and devoted to the construction of the road of said corporation; but said act is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely, when and as fast as any twenty-five miles of said road is con-

structed and accepted by the United States; and in the mean time, the legal title to the unearned and unpatented sections is in the United States, who may therefore maintain legal proceedings against any one that unlawfully cuts timber thereon. *United States* v. *Childers*, 171.

15. PATENT TO LANDS EMBRACING MINES.—Where a patent to lands is issued by the United States, it carries all mines in the lands patented to which no right has attached at the time the patent issues. *Pacific C. M. & M. Co.* v. *Spargo*, 645.
16. PATENT—COLLATERAL ATTACK.—The validity of a patent cannot be questioned collaterally in an action to recover the land patented. *Id.*
17. PATENT RELATES TO ENTRY.—Where a purchaser enters and pays for a tract of public lands, receiving a certificate of purchase therefor, the patent, subsequently issued in pursuance of such certificate, relates to, and takes effect from, the date of the entry. *Id.*
18. RESERVATION IN PATENT OF RIGHT TO WORK A MINE.—Where a patent to public land reserves the right of a proprietor of a mining vein or lode to extract and remove his ore therefrom should it be found to penetrate, or intersect, the lands granted by the patent, the reservation refers only to parties who are proprietors at the time when the right of the patentee attaches to the land, or the date of the entry or patent. *Id.*

QUI TAM ACTIONS.

1. QUI TAM ACTION UNDER SECTIONS 3490–3 OF THE REVISED STATUTES.—In an action brought by an informer upon sections 3490–3 of the revised statutes, to recover damages and forfeitures for collecting false claims from the treasury, the person who sues represents the United States therein, and also in all suits and proceedings brought or taken in aid of an execution or to enforce the judgment therein, and is entitled to control the same. *Bush* v. *United States*, 322.
2. PRIORITY OF THE UNITED STATES.—The priority of the United States, under sections 3466–7 of the revised statutes, does not attach in the life-time of an insolvent debtor unless his property is taken by process of law, as in bankruptcy, insolvency, or attachment, or he makes a voluntary assignment thereof to a third person for the benefit of his creditors; and a judgment or judgments confessed by such debtor for an amount equal to the value of his assets with intent to hinder, delay, or defraud the United States is not such an assignment. *Id.*

REMOVAL OF CAUSES.

1. REMOVAL OF CAUSES.—The second clause of section 639 of the Revised Statutes of the United States, was repealed by the Act of Congress of March 3, 1875. *Hollister* v. *Bell*, 349.

RES ADJUDICATA.

1. RES ADJUDICATA.—Prior to the acquisition of California by the United States, the Mexican government granted a tract of land therein to one H. In 1857, S., claiming to be the owner of a part of the land so granted under title derived from H. (the claim for which part had been confirmed to the grantor of S., but no patent therefor issued), commenced an action of ejectment against G. and others, who were in possession of the lands, also claiming to own the same under title derived from H., and

who had also obtained a confirmation of their claim to the premises, but no patent. On the trial of the action the principal question litigated was whether the premises in controversy had been conveyed by a deed made by H. to one F. under whom S. claimed, and it was determined that said deed did convey the lands, and judgment was rendered in favor of S. On appeal to the state supreme court this judgment was affirmed. Pending the litigation a patent for the lands was issued to the grantor of S., and some twenty years later, patents were issued to G. *et al.*, for the same lands. The grantees of G. *et al.*, after the issue of the latter patents, brought ejectment against the grantee of S. for the lands, and on the trial of that action offered to prove that the premises in controversy were not within the premises conveyed by the deed from H. to F. *Held*—that by the trial and judgment in the former action, that point was determined in favor of S. and became *res adjudicata*, and the grantee of G. *et al.* was estopped from again litigating the question as against S. or his grantee, and that the issue of the patents on the claims of G. *et al.* did not, as to the question so determined, create any new title or right to again litigate the question determined by the former judgment, and that such question is not open to further litigation. *Hayner* v. *Stanly*, 214.

ROADS AND ROAD TAXES.

1. ROAD WORK—LIABILITY FOR, HOW ENFORCED.—A statute of Oregon provides that all male persons between certain ages "residing" in a road district shall be annually listed for road labor on or before April 15th, and be liable to perform two days' work on the roads therein, and if any such person shall fail to do so after being assessed therefor and warned thereto by the supervisor, the latter may deliver a statement of such delinquency to the sheriff, with the amount necessary to discharge it, to wit, two dollars for each day's work, who shall thereupon collect the same by seizure and sale of the personal property of the delinquent; and if such property cannot be found out of which to make such tax, the sheriff shall demand the amount from any person indebted to such delinquent, and collect the same out of his personal estate, unless he makes oath that he is not indebted to such delinquent; and the sheriff shall receive for his services a sum equal to one fourth of such delinquent tax, besides his lawful fees, to be paid by the delinquent or collected with the tax. (Or. Laws, pp. 726, 727, sec. 21, 22, and pp. 769, 770, sec. 101, 102, 103.) *Held*, Semble, that a demand for a delinquent tax from a third person is not valid unless it appears therefrom: 1. That the officer had not been able to make the same out of the delinquent's property; 2. That it contained a statement or allegation to the effect that unless the party paid the amount or made oath that he was not indebted to the delinquent, the officer would proceed to collect the same out of his personal estate; and 3. That it was not for a greater sum than the tax, and one fourth thereof in addition, as a compensation to the sheriff for making the demand and receiving the money; and no other fees are demandable or chargeable thereon unless the officer is forced to make the collection by seizure and sale of property, for which he is entitled to the usual fees for such service, in addition to such one fourth. *On Yuen Hai Co.* v. *Ross*, 384.

2. IDEM—WHO LIABLE TO PERFORM.—Certain Chinese laborers came to this state to engage in labor upon public works, and on April 1, 1882, were in road district No. 8, in Multnomah county, at work on the construction of a railway from Portland to The Dalles and eastward, where they remained a few months, passing through and beyond the district as the road bed was completed, without any purpose or occasion to remain longer in the district or ever return there: *Held*, that they were not "residing" in said district on or before April 15th, within the meaning of the statute, so as to be liable to perform road labor therein. *Id.*

SECRETARY OF TREASURY—REGULATION.

1. DUTIES—SHRINKAGE IN WEIGHT.—Where a cargo of coke, imported from Wales, by reason of evaporation of the moisture contained in it during the voyage, weighed several tons less than when shipped: *Held*, that duties could only be legally collected on the actual weight at the time of the importation, and not on the weight shown by the invoice. *Balfour* v. *Sullivan*, 648.

2. REGULATION OF THE SECRETARY OF THE TREASURY.—A regulation of the secretary of the treasury, that duties shall be collected according to the invoice, unless the importer accounts, by proofs, for the discrepancy between the amount shown by the invoice and the actual weight at the time of importation, is no defense to an action to recover the duties exacted from the importer on the difference between the amount actually imported, and the amount shown by the invoice to have been shipped. *Id.*

SMUGGLING.

1. CUSTOM DUTIES—SMUGGLING—CONDEMNATION OF PROPERTY SEIZED.—Where a quantity of opium was seized by officers, the burden of proof is on the claimant to show that the property seized was of domestic manufacture, and not liable for custom duties; and if he fails to explain the difficulties of the case by the production of proofs within his power to produce, "condemnation follows from the defects of testimony on the part of such claimant." And where the claimant has it in his power to produce the best and most satisfactory evidence to repel the presumption which the law has raised against him, and he omits to do so, and contents himself with the weaker evidence, the presumption is "turned against him that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defence." *United States* v. *Boxes of Opium*, 129.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE.—A contract to convey real property will be specifically enforced as prayed for by the plaintiff where its terms are admitted by the defendant, and the only objection made to such performance is based upon a construction of the contract, as to the part to be performed by the plaintiff, which in the judgment of the court is unsupported by the language of the contract or the circumstances of the case. *Tanner* v. *Dundee Land Investment Co.*, 187.

2. EQUITY—SPECIFIC PERFORMANCE OF CONTRACT.—Equity has jurisdiction to enforce the performance of contract to deliver a policy of insurance; and having taken jurisdiction for that purpose, will, in case there has

been a loss or death, retain it for the purpose of decreeing payment of the policy *Hebert* v. *Mutual Life Ins. Co.*, 198.

SPIRITUOUS LIQUORS.

1. SPIRITS AND WINE—INTRODUCTION OF, INTO ALASKA.—By the act of March 3, 1873 (17 Stat. 530), the introduction of spirituous liquors and wines into Alaska is absolutely prohibited, subject to the power of the war department to permit such introduction for the use of the army therein; and, *semble*, that section 2 of the Alaska act of June 27, 1868 (15 Stat. 240; sec. 1954 R. S.), which gave the president "power to restrict and regulate or to prohibit the importation and use of * * * distilled spirits" into Alaska, is still so far in force, notwithstanding the passage of said act of March 3, 1873, as to authorize him to permit the introduction of said spirits, but not wine, as a regulation of the subject. *United States* v. *Stephens*, 116.

SPRING VALLEY WATER WORKS.

See CONSTITUTIONAL LAW; INJUNCTION.

STATUTES.

See LEGISLATIVE JOURNALS.

STATUTES (U. S.) CONSTRUED.

1850. Act Sept. 28, 9 Stat. 497. Donation Act, 41.
1852. Act 1852, 10 Stat. 90. Survey of Public Lands, 81.
1878. Act June 3, 20 Stat. 88. Timber on Public Lands, 100.
1873. Act March 3, 17 Stat. 530. Spirituous Liquors, Alaska, 116.
1868. Act June 27 (R. S. 1954), 15 Stat. 240. Spirituous Liquors, 116.
1834. Act June 30, 4 Stat. 729. Spirituous Liquors, 116.
Revised Stat., Sec. 4252–3. Passengers by Sea, 122.
Revised Stat., Sec. 909. 133.
1850. Sept. 27, 9 Stat. 497 and Am'd't to 10 Stat. 158. Donation Act, 142.
Revised Stat., Sec. 3736. Conveyance when void, 143.
1855. Act March 3, 10 Stat. 715, Sec. 4252, Revised Stat. Passengers, 162.
1873. Act March 3 (R. S. 3565), 11 Stat. 603. Lb. Sterling, 167.
1864. July 2, 13 Stat. 365. N. P. R. R. Grant, 171.
Revised Stat., Sec. 4965, 17 Stat. 214. Penalties and Forfeitures, 191.
Revised Stat., Sec. 3893. Obscene Letters, 194.
1865. March 3 (R. S., Sec. 4255), 10 Stat. 716. Passenger Vessels, 209.
Fourteenth Amendment U. S. Constitution, 15 Stat. 709. 238.
Revised Stat., Secs. 3490–3, 3466–7. *Qui Tam* Actions, 322.
Revised Stat., Sec. 639, and Removal Act 1875, 349.
1882. May 6, 22 Stat. 59. Chinese Immigrants, 350.
1842. Extradition Treaty with England, Art. X, 370.
1857. March 3, 10 Stat. 250. Timber on Public Lands, 403.
1878. June 14, 20 Stat. 130. Timber on Public Lands, 403.
Revised Stat., Secs. 2504–5. Sago Flour, Revenue, 415.
1882. May 6. Chinese Immigration, 438.
1834. Revised Stat., 5596, 2145, 5329. Indians, offenses against, 473.
1859. Sept. 27, 9 Stat. 497. Donation Act, 511.
Fourteenth Amendment, 15 Stat. 709. 556.
1859. Sept. 27, 9 Stat. 497. Donation Act, 592.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTORY CONSTRUCTION.

1. RE-ENACTMENT OF STATUTE—FORMER CONSTRUCTION OF IT.—Where a statute has received a judicial construction, and is afterwards re-enacted by the legislature of the same or another country, it is presumed to have been passed as construed. *The Devonshire*, 209.

STEAM VESSELS.

1. BERTHS ON STEAM VESSELS.—The provisions of section 2 of the act of March 3, 1855 (10 Stat. 716, sec. 4255 of the R. S.), relating to the construction and occupation of berths on vessels carrying passengers from foreign ports to the United States, are not deemed applicable to steam vessels. *The Devonshire*, 209.

STOCKHOLDERS' LIABILITIES.

1. LIABILITY—STOCKHOLDERS—MINING CORPORATION.—There being no *subscribed* stock, stockholders in *mining* corporations, organized under the laws of this State, are not liable, by contract, or by operation of law, to pay to the corporation the nominal par value of their stock, even though such nominal value has not been paid in. *In re South Mountain Con. M. Co.*, 366.
2. NO CONTRACT TO PAY FULL AMOUNT OF STOCK.—Purchasers of stock in such corporations are not, by contract, or by operation of law, bound to pay to the corporation the nominal par value of their stock; their only liability is the constitutional, and statutory, personal, liability for their proportion of the debts and liabilities of the corporation, and the liability of their stock to assessment by the corporation. *Id.*
3. POWER TO ASSESS NOT ASSETS.—The power to levy assessments by the corporation itself, is not an asset, or trust fund, and it does not pass as such to a court of bankruptcy; nor can such court enforce such liability of a stockholder to assessment by the corporation itself against stockholders of such corporations to discharge the liabilities of an insolvent mining corporation. *Id.*
4. PERSONAL ACTION.—As to whether a personal action will lie against a stockholder to recover an assessment levied by such corporations, *quære? Id.*
5. DEBT DUE BY STOCKHOLDER TO CORPORATION.—Judgment was obtained by the plaintiff against the defendant for nineteen thousand and two dollars and five cents, and an execution thereon as against the defendant returned *nulla bona* and served on F. B. Harrington as a debtor of the defendant for one hundred and sixty-eight dollars and fifty cents, on account of unpaid calls on assessments made upon said Harrington's shares in the capital stock of the defendant, to which Harrington answered he owed the defendant nothing; but the answer not proving satisfactory to the plaintiff, he procured an order under section 309 of the code requiring the former to appear before a referee for examination; whereupon the plaintiff served on him written allegations concerning said in-

debtedness as provided in section 162 of the code, to which the garnishee demurred that the court had no jurisdiction and that the garnishee is not liable in this proceeding. *Held*: 1. That the proceeding by garnishment under sections 150 and 161–169 of the code does not authorize a demurrer to the allegations of the plaintiff, but requires an answer thereto by the garnishee, to which exceptions may be taken for insufficiency; 2. A due and unpaid call or assessment upon the shares of a stockholder in the capital stock of a corporation is a "debt" due such corporation within the purview of section 147 of the code, and may be collected from such stockholder by a judgment creditor of the corporation by garnishment, under sections 150 and 161–169 aforesaid. *Fault* v. *A. G. & S. M. Co.*, 420.

See CORPORATIONS.

STREET OR HIGHWAY.

1. IDEM—CASE IN JUDGMENT.—Where the agreement authorized a corporation, proposing to construct a railway from Albina to Vancouver, to lay its track through the former place upon certain streets therein—"beginning at the ferry-landing at the foot of Mitchel street"—and it appearing that said ferry-landing and Mitchel street were different and not contiguous places: *Held*, That the ambiguity must be resolved against the corporation, and the agreement construed as if it read simply, "at the foot of Mitchel street." *Burns* v. *Multnomah R. Co.*, 543.
2. APPROPRIATION OF STREET OR HIGHWAY BY RAILWAY.—A railway corporation cannot be authorized under section 26 of the corporation act aforesaid, to appropriate a public street or road to its use, unless such road or street has been legally established, according to some mode prescribed by statute. *Id.*

SUPERSEDEAS.

See PRACTICE, 8.

TAXES AND TAXATION.

1. THE FOURTEENTH AMENDMENT OF THE CONSTITUTION, in declaring that no state shall deny to any person within its jurisdiction the "equal protection of the laws," imposes a limitation upon the exercise of all the powers of the state, which can touch the individual or his property, including among them that of taxation. *San Mateo Co.* v. *S. P. R. R. Co.*, 238.
2. THE "EQUAL PROTECTION OF THE LAWS" to any one implies not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation. *Id.*
3. UNIFORMITY IN TAXATION requires uniformity in the mode of assessment as well as in the rate of percentage charged. *Id.*
4. TAXATION OF MORTGAGES—PUBLIC CORPORATIONS AND NATURAL PERSONS.—By the thirteenth article of the Constitution of California, "a

mortgage, deed of trust, contract, or other obligation by which a debt is secured, is treated, for the purposes of assessment and taxation, as an interest in the property affected thereby," and, "except as to railroad and other *quasi* public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. (Sec. 4.) But by the same article "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county," are to be assessed at their actual value, and apportioned to the counties, cities, and districts in which the roads are located, in proportion to the number of miles of railway laid therein, no deduction from this value being allowed for any mortgages on the property: *Held*, That in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations as the basis of taxation, there is a departure from the rule of equality and uniformity. *Id.*

5. PRIVATE CORPORATIONS ARE PERSONS, within the meaning of the first section of the Fourteenth Amendment, and are entitled, so far as their property is concerned, to the equal protection of the laws. *Id.*
6. NOTICE—DUE PROCESS OF LAW.—Neither the Constitution nor the laws of California relating to the assessment of railroads operated in more than one county provide for notice to the owner, or an opportunity for him to be heard at any stage of the proceeding. In this respect both conflict with the guaranty that no one shall be deprived of his property without due process of law. *Id.*
7. SAME—NOTICE ESSENTIAL.—Whatever the character of the proceeding by which one is deprived of his property, whether judicial or administrative; and whether it takes the property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. *Id.*
8. THE PROVISIONS OF ARTICLE XIII OF THE CONSTITUTION OF CALIFORNIA, treating of revenue and taxation, are not conditions upon the continued existence of railroad corporations. *Id.*
9. RAILROAD ASSESSMENT UNCONSTITUTIONAL.—An assessment made in strict accordance with the provisions of the constitution of the state of California relating to the assessment of the property of "railroad and other *quasi* public corporations," violates the provisions of the fourteenth amendment to the constitution of the United States, by taking private property without due process of law. *S. F. & N. P. R. Co.* v. *Dinwiddie*, 312.
10. VOLUNTARY PAYMENT.—Such assessment is void. A payment under it is not a payment under duress, but is voluntary, and cannot be recovered. *Id.*
11. ROAD WORK—LIABILITY FOR, HOW ENFORCED.—A statute of Oregon provides that all male persons between certain ages "residing" in a road district shall be annually listed for road labor on or before April 15th, and be liable to perform two days' work on the roads therein, and if any such person shall fail to do so after being assessed therefor and warned

thereto by the supervisor, the latter may deliver a statement of such delinquency to the sheriff, with the amount necessary to discharge it, to wit, two dollars for each day's work, who shall thereupon collect the same by seizure and sale of the personal property of the delinquent; and if such property cannot be found out of which to make such tax, the sheriff shall demand the amount from any person indebted to such delinquent, and collect the same out of his personal estate, unless he makes oath that he is not indebted to such delinquent; and the sheriff shall receive for his services a sum equal to one fourth of such delinquent tax, besides his lawful fees, to be paid by the delinquent or collected with the tax. (Or. Laws, pp. 726, 727, secs. 21, 22, and pp. 769, 770, sec. 101, 102, 103.) *Held*, Semble, that a demand for a delinquent tax from a third person is not valid unless it appears therefrom: 1. That the officer had not been able to make the same out of the delinquent's property; 2. That it contained a statement or allegation to the effect that unless the party paid the amount or made oath that he was not indebted to the delinquent, the officer would proceed to collect the same out of his persoual estate; and, 3. That it was not for a greater sum than the tax, and one fourth thereof in addition, as a compensation to the sheriff for making the demand and receiving the money; and no other fees are demandable or chargeable thereon unless the officer is forced to make the collection by seizure and sale of property, for which he is entitled to the usual fees for such service, in addition to such one fourth. *On Yuen Hai Co.* v. *Ross*, 384.

TENANTS IN COMMON.

See MINES AND MINING.

TERRITORY.

1. TERRITORY, NOT A STATE.—The ruling in *New Orleans* v. *Winter* (1 Wheat. 91), that a territory is not "a state" within the meaning of that term as used in the constitution in making the grant of judicial power to the United States, and that, therefore, a resident of the former cannot sue in the national courts, as a citizen of a state, followed but questioned. *Watson* v. *Brooks*, 316.

TIMBER AND TIMBER CUTTING.

1. TIMBER ON PUBLIC LANDS IN OREGON.—The act of June 3, 1878 (20 Stat. 88), giving permission to the residents of Colorado, Nevada, the territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such state is regulated by the act of the same date (20 Stat. 89), providing, among other things, for the sale of timber lands therein. *United States* v. *Smith*, 100.
2. MINERAL DISTRICT.—This term, as used in the first of the said acts of June 3, 1878 (20 Stat. 88), has no application to Oregon, there being no such division or district of the state established, either by law or common reputation. *Id.*
3. CUTTING TIMBER—WHO MAY AND WHAT FOR.—Under the act of June 3, 1878 (20 Stat. 89), persons occupying the public lands in Oregon under